GENERAL AVERAGE

IN THE

UNITED STATES

WILLIAM R. COE

LAW AND PRACTICE

OF

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BY

WILLIAM R. COE

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PREFACE

This brief summary of the law and practice of General Average in the United States was prepared as an appendix to the Fifth Edition of Lowndes's treatise on General Average, recently published in London, and is here reprinted for private circulation, by the kind permission of the Editors and Publishers of that work. A few minor alterations and additions have been made; otherwise the text is as it stands in Lowndes. An index of cases and of subjects has been prepared especially for this edition.

In the limited space available, an attempt has been made to give a fairly complete treatment only of the more important and disputed questions of General Average, notably those involving the authority for the sacrifice, negligent navigation, salvage, substituted expenses, etc. The recent changes and development of the law have been in these branches, and their further growth is a subject of great interest to adjusters, underwriters, and to shipping interests generally.

It has seemed unnecessary to deal with the subjects of capture, embargo and ransom; and bottomry and sale of cargo to raise funds have been treated very briefly. Cases of General Average involving these matters are now rare; and when they do arise present conditions are so different from those of a prior generation that each case will have to be dealt with on its own facts and circumstances.

In other respects, it is hoped that the rules of law and practice will be found to be adequately, if not fully, set forth and explained; and that the legal authorities, where any exist, are correctly cited in the footnotes in support of the statements in the text. Limitations of space, as well as of time, have prevented as ample a treatment as the subject of General Average deserves, and the author hopes that the future may afford him an opportunity to expand this summary into a complete treatise.

For assistance in the preparation of the present volume the author is under many obligations to his associates of the average adjusting staff of Johnson & Higgins.

W. R. C.

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TABLE OF CASES CITED

GENERAL AVERAGE

LAW AND PRACTICE OF THE UNITED STATES

GENERAL PRINCIPLES.

The law of general average in the United States closely parallels in its growth that of Great Britain. It should be noted at the outset, however, that as the first decision mentioning the term general average in England was in 1799,[1] the United States had then become a separate nation, and the common law, which was taken over by us at the Declaration of Independence, became part of our fundamental law, so that the recorded law of general average had its beginning in the United States at a time when English decisions could not serve as precedents. Having been derived from the same continental sources and expounded by judges schooled alike in the common law, the development was and has been to all intents and purposes along the same lines, with a few divergences due to local custom, to the attitude toward common carriers and insurers, to statutes relating to carriage by sea, and to differences in judicial interpretation of the law.

Similarity of origin.

Cases involving questions of general average may come under the jurisdiction of either the District Courts of the United States (Federal Courts), or of the State Courts. The District Courts, however, have exclusive jurisdiction in Admiralty,[2] and proceedings *in rem* against vessels and in salvage cases are necessarily brought before them. In the United States a lien is given for general average, and as the Admiralty

[1]Lowndes, 4th Ed., p. 18.

[2]This jurisdiction was conferred by the Constitution, but covered only cases arising on the sea and on tide waters; in 1845, by an Act of Congress, the jurisdiction was extended to the Great Lakes and connecting waters. See *The Genesee Chief*, 12 How., 443; *Allen* v. *Newberry*, 21 How., 244.

Court by its process *in rem* affords the most convenient remedy against the ship, it has become the court before which nearly all the cases involving general average are now heard. Proceedings against cargo owners for contribution can be had, and in former years were most frequently brought, before the State Courts, but the Federal Courts have become, by a process of selection, the favored tribunal for cases involving general average, even where the State Courts are open to the parties. It may be pointed out, however, that in this country as in England the practice of adjusters is so well established and so generally recognized to-day that litigation of general average questions has become very infrequent; and cases that come before the Courts usually involve questions of fact, or some complicated question of law, where the sacrifice is made necessary by negligence or unseaworthiness.

The first case of general average contained in any American report is *Brown* v. *Cornwell*,[1] at a trial Court in Connecticut in the year 1773, in which jettison of horses from on deck was allowed in general average.

The first reported case of any moment in our Courts was *Campbell* v. *The Alknomac*,[2] in the United States District Court for South Carolina in 1798. This case is important as marking the beginning of the American rule as to port of refuge expenses. A vessel was on a voyage from Liverpool to Charleston, and put into Norfolk in distress. In allowing contribution for the expenses the Court said:

> "All necessary charges of unloading, reloading, anchorage, pilotage, storage, wharfage, and other such expenses incurred at Norfolk, together with wages and victualling of the crew from the day of consultation on board at sea as to seeking a port, till the day of her leaving Norfolk to return here, must be brought into general average."

[1] 1 Root (Conn.) 60.
[2] Bee, 124; Fed. Cas., 2350.

Another important early case was *Maggrath* v. *Church*,[1] in the Supreme Court of New York, the judgment in which was delivered by Chancellor Kent, author of *Kent's Commentaries*.

The first case, however, in which the principles of general average were exhaustively considered was *Caze* v. *Reilly*,[2] decided in the United States Circuit Court of Pennsylvania in 1814. It is interesting to note that in this case practically all the citations by counsel and the Court were from the old continental text writers, ordonnances and laws, and that in this and the *Maggrath* case *Birkley* v. *Presgrave*[3] was cited. The judgment in *Caze* v. *Reilly* has been referred to with approval on several occasions by the United States Supreme Court, and as that judgment was based so largely on the continental authorities, it is safe to say that our law has been much influenced thereby.

As Lowndes has noted in his Fourth Edition, the decisions of the Courts in either country have been regarded with deference in the other, and the tendency of the two, especially of late, has been towards uniformity rather than separation. Lowndes remarks[4] that the American judges have been the first to arrive at conclusions which have afterwards been adopted in England; as, for instance, with regard to the means taken to extinguish a fire, and in allowing contribution where the vessel is in ballast or where vessel and cargo are of the same ownership.

It should be observed that the York-Antwerp Rules are embodied nowadays in nearly all contracts of affreightment for foreign voyages, and for many of the longer voyages in the coasting trade. It is interesting to note that in an important case the United States Supreme Court has stated that the York-Antwerp Rules relate only to the subjects of contribution in

[1] 1 Caines, 195, (1803).
[2] 3 Wash., Cir. Ct. 298; Fed. Cas., 2538.
[3] 1 East, 220.
[4] Fourth Edition, 605.

general average, and do not deal with the underlying principles; and that the English Courts hold the same view.[1]

Definition of General Average.

In the matter of definition, no American judge has succeeded in improving upon the compact and comprehensive definition of general average given by Lawrence, *J.*, in *Birkley* v. *Presgrave*. Most of the early attempts of our judges to define the subject deal only with sacrifices and fail to include expenses.

The most comprehensive treatment of the theory and history of general average will be found in *Caze* v. *Reilly*, already cited, and in the opinion of Story, *J.*, in *Columbian Ins. Co.* v. *Ashby*,[2] in the United States Supreme Court in 1839.

In the former case, Washington, *J.*, said:

> "The object is to incur a partial loss and to risk a minor or contingent danger to avoid the more certain loss of all."

In the latter case, Story, *J.*, states the requirements for contribution as follows:

> "First: That the ship and cargo should be placed in a common, imminent peril.
>
> Secondly: That there should be a voluntary sacrifice of property to avert that peril.
>
> Thirdly: That by that sacrifice the safety of the other property should be presently and successfully attained."

As to the basis of general average, the same eminent jurist remarks:

> "The principle on which this contribution is founded is not the result of a contract, but has its origin in the plain dictates of natural law."[3]

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[1] *Ralli* v. *Troop*, 157 U. S., at page 412 (1894); *Greenshields* v *Stephens*, 13 Com. Cases, 91; (1908) Appeal Cases, 431.

[2] 13 Pet., 331.

[3] Story, *Equity Jurisdiction*, p. 490.

In *Sturgis* v. *Cary*,[1] Curtis, *J.*, says:

> "The fact that the peril impending over the ship and cargo would have destroyed both if not averted, so far from being inconsistent with a claim of this kind, is a necessary prerequisite to the voluntary act of the master; and what is denominated a sacrifice means, not that its subject was destroyed, or even subjected to greater danger than it was already in, but that it was selected to suffer alone and thus avert the common peril."

And in another case under the same title, arising from the same accident,[2] the same judge said:

> "It depends upon a principle of natural justice that they who have received a common benefit from the sacrifice voluntarily made by one engaged in a common adventure should unite to make good the loss which that sacrifice occasioned."

In the case of the *Star of Hope*,[3] Clifford, *J.*, says:

> "General average contribution is defined to be a contribution by all the parties in a sea adventure to make good the loss sustained by one of their number on account of sacrifices voluntarily made of part of the ship or cargo to save the residue and the lives of those on board from an impending peril, or for extraordinary expenses necessarily incurred by one or more of the parties for the general benefit of all the interests embarked in the enterprise. Losses which give a claim to general average are usually divided into two great classes: (1) Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing. (2) Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.

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[1] 2 Curt., 59; Fed. Cas., 13572.
[2] 2 Curt., 382; Fed. Cas., 13573.
[3] 9 Wall., 203 (U. S. Sup. Ct.).

"Common justice dictates that where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger or incurs extraordinary expenses to promote the general safety, the loss or expenses so incurred shall be assessed upon all in proportion to the share of each in the adventure.

"Where expenses are incurred or sacrifices made on account of the ship, freight and cargo, by the owner of either, the owners of the other interests are bound to make contribution in the proportion of the value of their several interests, but in order to constitute a basis for such a claim it must appear that the expenses or sacrifices were occasioned by an apparently imminent peril; that they were of an extraordinary character; that they were voluntarily made with a view to the general safety; and that they accomplished or aided at least in the accomplishment of that purpose.

"Authorities may be found which attempt to qualify this rule, and assert that where the situation of the ship was such that the whole adventure would certainly and unavoidably have been lost if the sacrifice in question had not been made, the party making it cannot claim to be compensated by the other interests, because it is said that a thing cannot be regarded as having been sacrificed which had already ceased to have any value, but the correctness of the position cannot be admitted unless it appears that the thing itself for which contribution is claimed was so situated that it could not possibly have been saved, and that its sacrifice did not contribute to the safety of the crew, ship, or cargo. Sacrifices, where there is no peril, present no claim for contribution, but the greater and more imminent the peril the more meritorious the claim for such contribution, if the sacrifice was voluntary and contributed to save the associated interests from the impending danger to which same were exposed.

"Such claims have their foundation in equity, and rest upon the doctrine that whatever is sacrificed for the

common benefit of the associated interests shall be made good by all the interests which were exposed to the common peril and which were saved from the common danger by the sacrifice. Much is deferred in such an emergency to the judgment and decision of the master; but the authorities, everywhere, agree that three things must concur in order to constitute a valid claim for general average contribution; First, there must be a common danger to which the ship, cargo and crew were all exposed, and that danger must be imminent and apparently inevitable, except by incurring a loss of a portion of the associated interest to save the remainder. Secondly, there must be the voluntary sacrifice of a part for the benefit of the whole, as for example a voluntary jettison or casting away of some portion of the associated interests for the purpose of avoiding the common peril, or a voluntary transfer of the common peril from the whole to a particular portion of those interests. Thirdly, the attempt so made to avoid the common peril to which all those interests were exposed must be to some practical extent successful, for if nothing is saved there cannot be any such contribution in any case.

"Equity requires, says Emerigon, that in these cases those whose effects have been preserved by the loss of the merchandise of others shall contribute to this damage, and commercial policy as well as equity favors the principle of contribution, as it encourages the owner, if present, to consent that his property, or some portion of it, may be cast away or exposed to peculiar and special danger to save the associated interests and the lives of those on board from impending destruction; and if not present, the moral tendency of the well-known commercial usage is to induce the master to exercise an independent judgment in the emergency for the benefit of all concerned."

The above definition, or exposition, it will be seen, includes extraordinary expenses incurred for the joint benefit of ship and cargo, or with a view to the general safety.

Authority for sacrifice.

Consultation of the master with the officers and crew is not necessary before making the sacrifice.[1] Our courts are reluctant to question the judgment of the master.

The following remarks of Clifford, *J.*, in the *Star of Hope, supra,* are of interest in this connection:

> "Masters are often compelled, in the performance of their duties, to choose between the probable consequences of imminent perils threatening the loss of the ship, cargo, and all on board, and a sacrifice of some portion of the associated interests in their custody and under their control, as the only means of averting the dangers of the impending peril in their power to employ. They must elect in such an emergency, and if they, in the exercise of their best skill and judgment, decide that it is their duty to lighten the ship, cut away the masts, or to strand the vessel, courts of justice are not inclined to overrule their determinations.
>
> "Owners of vessels are under obligation to employ masters of reasonable skill and judgment in the performance of their duties, but they do not contract that they shall possess such qualities in an extraordinary degree, nor that they shall do in any given emergency what, after the event, others may think would have been best. From the necessity of the case the law imposes upon the master the duty, and clothes him with the power, to judge and determine, at the time, whether the circumstances of danger in such a case are or are not so great and pressing as to render a sacrifice of a portion of the associated interests indispensable for the common safety of the remainder. Standing upon the deck of the vessel, with a full knowledge of her strength and condition, and of the state of the elements which threaten a common destruction, he can best decide in the emergency what the necessities of the moment require to save the lives of those on board and the property intrusted to his care, and if he is a competent master, if an emergency actually existed calling for a decision whether such sacrifice was required, and if he appears

[1] *Columbian Ins. Co.* v. *Ashby,* 13 Pet., 332.

> to have arrived at his conclusion with due deliberation, by a fair exercise of his own skill and judgment, with no unreasonable timidity, and with an honest intent to do his duty, it must be presumed, in the absence of proof to the contrary, that his decision was wisely and properly made."

Sacrifices made in good faith for the general benefit are made good in general average even though made under mistaken idea as to impending danger.

In *The Wordsworth*,[1] where the forepeak filled with water during heavy weather and it was thought that the steamer was holed below the waterline, the sluices were opened and the water allowed to run to the engine room, doing damage to the cargo. By this means the water in the forepeak was reduced and it was found that the leak was occasioned by a break in the port hawsepipe and there had been no necessity for opening the sluices. The Court held that the damage to the cargo was general average.

To give rise to general average contribution, the sacrifice must be sanctioned by the master, or other person in authority connected with the adventure. Where a ship on fire is scuttled by the port authorities, acting on their own initiative, without the sanction, express or implied, of the master or other commanding officer of the ship, and against the protest of such officer, as respects some of the measures taken; and where it is shown that the acts of the port authorities were not only for the purpose of putting out the fire on the vessel but also to protect and preserve the shipping and other property, the damage done by the port authorities is not general average.[2]

Where fire broke out in a vessel alongside a wharf, and the services of the Fire Department were invoked by the officers

[1] 88 Fed., 313.

[2] *Ralli* v. *Troop*, 157 U. S., 386; *Minneapolis, St. P. & B. S. S. Co.* v. *Manistee Transit Co.*, 156 Fed., 424; *Wamsutta Mills* v. *Old Colony Steamboat Co.*, 137 Mass., 471.

of the vessel and the master directed the operations of the firemen, the sacrifices made were held to be general average.[1]

In *Ralli* v. *Troop*,[2] there was a strong dissent from the judgment of the Court by two of the judges, and the decision has been the subject of much adverse comment on the part of lawyers, adjusters, underwriters and others versed in matters of general average, who hold the view that as the doctrine of general average is based on the highest principles of equity, the proper question by which to test a general average sacrifice should be, not Who authorized the act? but Was the sacrifice for the *benefit* or *safety* of the adventure? Unless the facts are fully understood, the *Ralli* decision is subject to misconception as to its scope. In considering this case the following points should be remembered: the port authorities came to the vessel unsolicited; they did not act with the sanction of the master, but, in fact, acted against his protest in respect to some of the steps taken, and the Court proceeded upon the assumption of fact that the port authorities were influenced rather by a desire to protect the shipping and other property of the port than by a desire to effect the greatest possible saving of the vessel and her cargo.

In the seventeen years since the decision in *Ralli* v. *Troop*, a large number of burning cases have come to our notice, but we have known of only two such cases in which it was necessary to deny the claim for general average on account of the intervention of port authorities.

It is interesting to note that while the *Ralli* case was cited in the English Court in the case of *Papayanni* v. *Grampian S. S. Co.*,[3] Mathew, *J.*, apparently distinguished that case from the *Ralli* case on the ground that the master sanctioned what was done by the port authorities and that it was in the interest of ship and cargo.

[1] *The Roanoke*, 46 Fed., 297; 53 Fed., 270; 59 Fed., 161.
[2] 157 U. S., 386.
[3] 1 Com. Cas., 448.

Where a tug and her tow were in danger of being driven on a lee shore in a storm, and the master of the tug cut the towing hawser and the tows drifted ashore and were lost, it was held that, although it was the act of the master of the tug, the tug was not liable to contribute in general average for the loss of the tows.[1]

Is successful result necessary?

There must be some measure of success as a result of the sacrifice. On this Gourlie[2] comments as follows:

> "The sacrifice, however, is considered successful if the interests are even temporarily saved, although subsequently overwhelmed by another disaster; as, if a vessel be thrown on her beam ends, and is only righted by a sacrifice of some of the spars and rigging, although the vessel and most of her cargo be afterwards lost by stranding or another peril, contribution would be due from whatever is eventually saved."

As Lowndes[3] adds:

> "Gourlie, however, is not satisfied with even this limitation of the older rule requiring that the sacrifice must be successful. He lays down as a principle to be inflexibly adhered to, that that equality which subsisted amongst the several interests at the moment preceding the sacrifice shall be reinstated by the contribution under all circumstances. It appears to me that the principle he contends for, and which certainly, so far as I have had opportunities for observing, governs the general practice of American as well as English adjusters, is precisely that set forth in other words in Sec. 6 of the first chapter of this book. Gourlie's republican idea of equality, as a sort of natural level which must constantly be maintained or restored, is practically identical with Arnould's theory, that it must be made in result immaterial whether

[1] *J. P. Donaldson* (1896), 167 U. S., 599.
[2] Page 8.
[3] Fourth Edition, page 607.

> my property or that of another man, has been taken to save the whole.
>
> If, then, after a sacrifice of property, the remaining property is totally lost, no matter whether by an independent accident or by that which led to the sacrifice, there can be no contribution, because all are already equal, each having lost all he had on board. But if some part is recovered, there must be a contribution, because the portion sacrificed thereby lost its chance of the ultimate recovery; but this contribution must be so framed as only to put the part sacrificed on an equality with the remainder: *e.g.*, if one-tenth of the entire value be saved, one-tenth of the value of what was sacrificed must be replaced."

The foregoing remains a correct expression of the American law and practice of to-day.

Where a vessel stranded, and a large portion of her cargo was jettisoned for the purpose of floating her, but without avail, and she was abandoned by the crew but later floated off and was picked up derelict and taken into port, Story, *J.*, said:

> "In respect to the jettison of the cargo, it is clear that it constitutes a case of general average to be borne by the ship, freight and cargo ultimately saved."[1]

Expenditure followed by total loss.

Where the general average act has consisted of an absolute outlay of money, *e.g.*, through going into a port of refuge, and the ship is afterwards totally lost on her voyage, our law as to whether or not there must be contribution is unsettled. While there is dictum in an early case[2] that under such circumstances contribution is due, no case, so far as the writer is aware, has clearly decided that it is due.

[1] *The Nathaniel Hooper*, 3 Sumner, 542; Fed. Cas. 10032, at p. 1188.
[2] *Spafford* v. *Dodge*, 14 Mass., at p. 72 (1817).

Gourlie is in favor of contribution. He says:[1]

> "No reason can be given why such expenditure should be borne by one person rather than another, and equity clearly requires their division, as otherwise the advancer of money would, without compensation, become an underwriter upon the adventure for the completion of the voyage."

In *Hobson* v. *Lord*,[2] however, there is an intimation that only property which has been preserved is bound to contribute to extraordinary expenses.

It seems to me that the party making the advances should be under an obligation to protect them by insurance until the voyage is terminated. At the time of the case mentioned, there was rarely an opportunity so to protect such advances or to apply to the cargo interests for funds, as the means of communication with vessels in ports of distress were limited, and frequently vessels had subsequently been lost, or had arrived at destination before the owners were aware of the accident and the advances made. There was then good reason for holding the cargo liable for contribution if the vessel were lost before the completion of the voyage. Now, by means of the cable, owners are promptly advised of such accidents, and, therefore, are in a position to protect their advances by insurance or to communicate with the cargo interests. Indeed, it is customary for the owner making the advances to effect such insurance, and, therefore, it would seem that the owner should now be charged with this duty, and, if he neglects it, in the event of total loss before arrival at destination the owners of cargo should not be held liable for contribution to such expenses. The premium for such insurance is charged to general average.

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[1]Gourlie, p. 12.
[2]92 U. S., 397, at pp. 405-409.

In *The Julia Blake*,[1] the Court denied the authority of the master to put burdens of doubtful benefit on the goods, which the owners of the goods, if present, or, if informed by cable of the circumstances, would not have authorized. A cargo owner, if communicated with in such circumstances, would either approve of the expenditure, or disapprove. If he approved, presumably he would insure, or would expect the owner to insure the advances; and if he disapproved and the master still elected to make the expenditure, the master would do so at his own risk, and in that event, presumably *he* would insure. Or, possibly, the master might refuse to make advances for account of all concerned, and require the cargo to provide its own share of the expenditures. In such a case, also, no doubt, the cargo owner would insure his outlays.

Another alternative would be for the master to obtain advances on bottomry and respondentia security, when the burden of insuring would be upon the lender. Or, finally, the master, in certain contingencies, might sell a part of the cargo and obtain funds to cover its share of extraordinary disbursements.

If, in any of the cases supposed, the ship and cargo should be totally lost after the extraordinary expenditures were made, the cargo owner would lose nothing beyond the value of the goods, except, possibly, the cost of an insurance premium. If the shipowner or the master, instead of adopting either of these alternative courses, should volunteer to make advances for extraordinary disbursements on account of cargo, and should fail to insure them, upon what equitable or legal right could he justify a claim for contribution from the owners of the cargo in the case of its subsequent total loss? I can see no ground for such a claim in principle, and certainly there is no authority for it in decided cases. The shipowner is not always bound to act as banker for the adventure, and if he volunteers to do so without

[1] 107 U. S., 418.

communicating with the cargo, or obtaining its authority, and fails to protect himself by insurance, the risk of subsequent loss of the advances should be upon him, and not upon the cargo.

A possible exception may exist in cases where the master, in good faith, and in the exercise of good judgment, at a time of peril, makes an extraordinary expenditure for the common benefit and safety of the adventure without having an opportunity to communicate with the owners of ship or cargo, and both are subsequently totally lost. In such a case there is ground for the contention that contribution should be made by the cargo owner to the extraordinary expenditures, notwithstanding the subsequent loss of ship and cargo; but the matter is involved in much doubt, and, in the absence of authority, no decided opinion is expressed with regard to it.

Theory of alternative.

In a case of voluntary stranding, in the United States Supreme Court, where it was strenuously contended that it was inevitable that the vessel must strand in some place, and there should, therefore, be no general average allowance for the loss resulting from voluntary stranding, Grier, J., in rejecting that contention, said:

> "When contribution is refused, because the thing whose loss is anticipated by the master's act, is already in danger of destruction, it is to be remembered that the things saved were in equal danger."[1]

And this is unquestionably the principle upon which our law of voluntary stranding and wreck cut away is largely founded. As Lowndes[2] remarks:

> "The law of the United States appears absolutely to reject the doctrine that, to give rise to general average, there must be a choice between two alternative methods

[1] *Barnard* v. *Adams*, 10 How., 270 (1850).
[2] Fourth Edition, p. 609.

of saving the ship and cargo. This is shown in some of the decisions already cited, on the subject of voluntary stranding, and is set forth, not without a certain wholesome scorn, by Mr. Gourlie, who concludes that 'the only alternative necessary is that of total loss.'"

Causa causans.

There is no difference between English and American law in this regard. The statement of the earlier text writers that there can be no general average when the accident from which the sacrifice emanated has arisen from the ship's unseaworthiness, or from the fault or negligence of the master or crew, or from the *vice propre* of the cargo, is subject to limitation. The doctrine of general average is not dependent upon the cause of the accident which necessitated the sacrifice or expenditure. It is governed by the facts as they exist at the time of such sacrifice or expenditure, and even though the accident has been the result of unseaworthiness, negligence, or *vice propre* of the cargo, there may be a general average; but the party responsible for such unseaworthiness, or negligence, or for knowingly shipping cargo in an unsound condition, is not entitled to contribution.[1]

The perils arising from these causes may necessitate sacrifices of the cargo of some of the shippers, and the shipowner's liability may be limited by law to an amount less than the total damage, or the shipowner may be exempted by contract from liability. In such cases, the owners of the cargo would be entitled to contribution, one from the other.

The *City of Para.*

In *Pacific Mail S. S. Co.* v. *N. Y. & H. M. Co.*,[2] the *City of Para,* loaded with a general cargo, stranded through negligent navigation. As it was feared she would go to pieces, in order to make the vessel rest easy, the sluices were opened and

[1] *Schooner Wm. J. Quillan,* 168 Fed., 407; 175 Fed., 207; 180 Fed., 681.

[2] 69 Fed., 414; 74 Fed., 564.

she was filled with water. She was afterwards floated by salvors and taken to destination.

This case arose prior to the passage of the Harter Act,[1] and the owners of the vessel were liable for all damages arising from negligence, subject to their right to limit liability to the value of the vessel and freight. Proceedings were taken against the ship by some of the consignees, and her owners' liability was limited to a sum considerably smaller than the cargo loss. This sum was paid into court and distributed among such owners of the cargo as had taken proceedings.

In the general average statement the damage to the cargo by the flooding of the vessel was allowed in general average. The consignees who had recovered in the court proceedings were charged with the amounts recovered, and the general average was apportioned on the arrived values of the cargo, including the amounts made good. As the shipowners had surrendered her value, the ship was not brought in as a contributing factor. The average statement was contested by the owners of a shipment of specie on the following grounds, among others:

1st: That there could be no general average, as the accident which gave rise to the sacrifice had been the result of negligent navigation.

2nd: That there could be no general average without the ship contributing.

3rd: That the recovery in the Court proceedings could not be disturbed by application of the principles of general average.

The Circuit Court of Appeals decided against these contentions, and on the first point followed the English decision of *Strang, Steel & Co.* v. *Scott.*[2]

In a more recent case, where fire broke out through *vice propre* of the cargo, it was held that as the shippers had not

Vice propre of cargo.

[1] Feb. 13, 1893.
[2] 14 App. Cas., 601.

knowingly shipped an improper cargo they were entitled to allowance in general average for the damage by water used in extinguishing the fire.[1] Even if the shippers did have actual knowledge of the condition of the cargo when shipped, other shippers would be entitled to allowance for any damage done to their cargo in extinguishing the fire, with the right of recourse against the guilty party.

Effect of Harter Act.

On February 13, 1893, Congress passed the statute known as the Harter Act, which provided that on compliance with certain conditions the shipowner should not be liable for loss of or damage to cargo resulting from faults or errors in navigation, etc. After this act became law, it was generally considered that, as its terms exempted the shipowner from direct liability for losses arising from negligent navigation, he was entitled to recover in general average for the ship's sacrifices which had minimised the greater loss for which he was now relieved from liability. Certain cargo underwriters, however, raised the issue that, as the Harter Act did not expressly mention the subject of general average, there had been no change in the law then existing, and this important question came up for decision in the case of *The Irrawaddy*.[2] That vessel had stranded through negligence and was floated by salvors after a jettison of part of the cargo and after various sacrifices by the vessel. Some of the cargo underwriters settled their liability on the basis of all of the sacrifices and expenditures being general average; others admitted their liability to contribute in general average for all sacrifices and expenditures for which there had been a lien on the cargo in favor of third parties, and contested their liability for contribution to the shipowner's sacrifices. The reason for this distinction was that when the shipowner settled the claims for salvage, jettisoned cargo and other expenses for which third parties had a lien, he did so as the agent for all interests, and if he had not set-

The *Irrawaddy*.

[1] *Schooner Wm. J. Quillan*, 168 Fed., 407; 175 Fed., 207; 180 Fed., 681.

[2] 82 Fed., 472; 88 Fed., 987; 171 U. S., 187.

tled them each owner of cargo would have been directly liable to the parties holding liens, and the Harter Act would have been a bar to recovery from the shipowner of the amounts paid by the cargo owners to satisfy such liens. The legal contest, therefore, was solely on the question of the right of the shipowner to recover for his sacrifices. The District Court upheld the owner's right to contribution. The case then went direct to the Supreme Court of the United States, which reversed the District Court, and held that the Harter Act had not affected the general average liabilities which existed prior to the adoption of that act, and decided against the shipowner.

The *Irrawaddy* case was followed by *The Strathdon.*[1] In this case, fire broke out in a cargo of sugar, and in order to extinguish it, the steamer was partly filled with water. In the average statement all of the sacrifices were treated as general average. The owners of the cargo contended that the fire was the result of negligence, and that the ship's sacrifices should not be allowed, but that the ship must contribute to the sacrifices of the cargo. The Court held, however, that as the cargo had claimed contribution in general average, the vessel was entitled to offset against the cargo claims to the extent of the cargo's proportion of her own expenditure. The *Strathdon.*

This led to a most unsatisfactory state of affairs. It put the application of the doctrine of general average on a basis of self interest, as, if the shipowner's contribution to the cargo's sacrifices proved to be less than the cargo's contribution to the ship's sacrifices, the particular cargo owner interested refrained from claiming in general average—a situation quite opposed to the principles of equity upon which general average is founded. In cases of vessels with general cargoes, where the sacrifices had arisen from negligent navigation, and the cargo of some shippers had been sacrificed and others not, the complications that ensued were practically interminable.

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[1] 94 Fed., 206; 101 Fed., 600.

Negligence General Average Clause.

With a view of meeting this situation a clause was inserted in many bills of lading.[1] The legality of this clause was questioned in the United States District Court in the case of the *Yucatan*,[2] which held that in effect it was a negligence clause, and that as regards common carriers such clauses were invalid because in conflict with our declared public policy.[3]

The *Yucatan*.

The *Jason*.

This case was followed by that of the *Jason*,[4] which, loaded with a general cargo, stranded through negligence and was floated by salvors after a jettison of some of the cargo and after sacrifices on the part of the vessel. The bill of lading contained a clause identical with that in the *Yucatan* case. All of the sacrifices and expenditures were treated as general average. The shipowners proceeded against the cargo for the balance due under the average statement, and the cargo proceeded against the ship for contribution to the jettison alone. The District Court, following the *Irrawaddy* judgment, decided against the shipowner's claim, and, following the *Strathdon* judgment, decided against the cargo's claim. On account of the decision in the *Yucatan* case the validity of the bill of lading clause was not argued in the District Court. On the appeal being heard in the Circuit Court of Appeals the validity of the bill of lading clause was argued in that Court for the first

[1] This clause reads as follows: "If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew in the navigation or management of the ship, or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average or for any special charges incurred, but, with the shipowner, shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness."

[2] *Ansonia Clock Co.* v. *N. Y. & Cuba Mail S. S. Co.*, 139 Fed., 894 (*The Yucatan*).

[3] The Courts of New York and of some other States have decided that negligence clauses in bills of lading of common carriers are valid. In such cases in those Courts there is no appeal from the State Courts to the Federal Courts.

[4] 162 Fed. 56; 178 Fed. 419.

time, and the cargo interests made a determined stand for a revision of the law laid down in the *Strathdon* case. The Court held the bill of lading clause invalid, and modified the *Strathdon* doctrine by holding that by virtue of the Harter Act, the ship was exempt from all claims by cargo, direct or indirect (including general average), resulting from negligent stranding, and, while the ship was not liable to contribute, that did not debar the owners of jettisoned cargo from obtaining contribution from the other interests.

This decision was received with much concern in underwriting and average adjusting circles. It appeared to be at variance with other decisions, especially those holding that the United States Statute exempting shipowners from liability for losses by fire did not exempt the ship from contribution to the cargo for sacrifices of cargo necessitated by fire.[1] The logical result of the *Jason* decision is that if two ships strand, one through negligence and the other not, and both jettison cargo, the shipowner whose crew is negligent will now fare better than the shipowner whose navigators are free from fault. In this state of the law, it would have been more advantageous to the cargo interests if *The Irrawaddy* had been decided in favor of the shipowners' contention, or if the validity of the bill of lading clause had been upheld.

A petition to the Circuit Court of Appeals for a rehearing was granted, and that Court certified to the United States Supreme Court for its opinion the three following questions:

> 1. Whether the General Average Agreement, above quoted from the bills of lading, is valid and entitled the shipowner to collect a general average contribution from the cargo owners under the circumstances above stated in respect to sacrifices made and extraordinary expenses incurred by it subsequent to the stranding for the common benefit and safety of the ship, cargo and freight.

[1] *The Roanoke*, 46 Fed., 297; 53 Fed., 270; 59 Fed., 161; *The Rapid Transit*, 52 Fed., 320; *The Santa Ana*, 154 Fed., 800.

2. Whether, in view of the provisions of the third section of the Harter Act, the cargo owners, under the circumstances above stated, have a right to contribution from the shipowner for sacrifices of cargo made subsequent to the stranding for the common benefit and safety of ship, cargo and freight.

3. Whether the cargo owners, under the circumstances above stated, can recover contribution from the shipowner in respect of general average sacrifices of cargo without contributing to the general average sacrifices and expenditures of the shipowner made for the same purpose.

It is expected that the Supreme Court will hear the case in the near future.

It will be seen that the present state of the law is very unsatisfactory, and is decidedly opposed to the principles of general average as recognized and applied by all maritime nations. In England and other leading maritime nations, the shipowner can protect himself by contract. The position of the American adjuster in applying correct principles of general average becomes an unenviable one, as he is met with extraordinary difficulties in the preparation of general average statements, which are already greatly complicated. The questions involved are of very great importance to all engaged in maritime commerce, since a large percentage of general average statements emanate from cases of stranding or collision, and many of such accidents are held to be due to fault. As a result, interminable disputes over facts, and the difficulty of applying principles in the present condition of the law, interfere with the smooth running of commercial transactions; a fair and workable rule is therefore much to be desired.

As before explained, in *The Irrawaddy* the cargo admitted its liability for salvage and other expenses which gave a lien on the cargo to a third party. After that decision, to expedite the completion of the voyage, shipowners generally

advanced funds to discharge such liens, feeling secure in their right of recoupment from the cargo. Under the *Jason* decision, such procedure on the part of the shipowner would no longer be safe, unless, before making the advances, he had an absolute undertaking of reimbursement from the cargo interests. He has the right to let the ship wait in the port of distress until each cargo interest has settled the direct liens against it,—a course which, if pursued in these days of large vessels carrying many shipments of cargo, would cause endless delays and increase of expense, to the disadvantage of American commerce.

Another feature entitled to consideration is the effect that the denial of contribution to the ship's sacrifices may have on the mind of the master when a sacrifice is necessary. Presumably, these sacrifices of the vessel were made in order to avoid the greater expenses of salvage or jettison of the cargo. As the shipowner would not be directly liable for this greater loss, is it not fair to suppose that the master's knowledge that a sacrifice of the ship's material would involve no contribution from the cargo may affect his better judgment and cause him to employ salvors, or jettison cargo, being aware that his owner would profit thereby? It seems desirable, in the interest of commerce, that the master should be encouraged to make, at the right time, the sacrifice best for all the interests concerned, and should not be trammeled by considerations of benefit to a particular interest.

As a learned Judge (Clifford, *J.*), in referring to general average, said:

> "The moral tendency of the well-known commercial usage is to induce the master to exercise an independent judgment in the emergency for the benefit of all concerned."[1]

[1] *Star of Hope*, 9 Wall., 203, *supra*, p. 7; and see *Johnson* v. *Chapman*, 19 C. B. (N. S.), 563, at p. 582; 35 L. J. (C. P.), 23, at p. 28, where Willes, *J.*, said: "It would defeat the main utility of general average if at a moment of emergency the captain's mind were to hesitate as to saving the adventure through fear of casting a burden on his owners."

Much experience with these controversies convinces me that underwriters, who are really the parties in interest, would not suffer greatly in the long run if the bill of lading clause were upheld. As a rule, the amount involved in the cargo's contribution to the ship's sacrifices is not serious. Disputes take up a great deal of time and prevent the settlement of important cases, which, in the interest of commerce, is to be deprecated. At times, an underwriter may be interested as an insurer of the ship, and it is then to his interest to obtain contribution from the cargo; and *vice versa*.

When the result of negligence of compulsory pilot.

The United States Supreme Court has decided that at common law the owner of a vessel has no liability for damages resulting from the negligence of a pilot compulsorily employed.[1] As in these circumstances, the fault of the pilot is not the fault of the shipowner, a cargo owner is liable for general average arising through such negligence, where the proceedings are at common law.

Effect of negligence when vessel not a common carrier.

When the owner of the cargo has contracted for the entire capacity of the ship, it has been held in the United States Courts that the owner of the vessel is not a common carrier, but a private carrier for hire, and that negligence clauses in the contract of affreightment are valid.[2]

While the question of the liability for general average in these circumstances has not as yet come before our Courts, it would seem that in the present state of our law a negligence general average clause, such as that in the cases of *The Yucatan* and *The Jason*,[3] would be upheld, and even where the contract only contained the ordinary negligence clause our Courts would follow the English decisions and the cargo would be liable for general average.

Bill of Lading Clause where unseaworthiness or latent defect.

In the United States the vessel must be seaworthy when she *sails* on the voyage, and at each subsequent stage of it.

[1] *Homer Ramsdell Transportation Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S., 406.
[2] *The Fri*, 154 Fed., 333; *The Royal Sceptre*, 187 Fed., 224.
[3] 139 Fed., 894; 178 Fed., 419.

An owner, by proper provision in the contract of affreightment, may be exempted from liability for loss resulting from unseaworthiness or latent defect existing at the time of sailing, provided he has used due diligence to make the vessel seaworthy.[1]

It is, therefore, clear that, so far as concerns unseaworthiness, the bill of lading clause in controversy in *The Yucatan* and *The Jason* is valid; and even where the contract only contains the exemption from losses resulting from unseaworthiness existing at the time of sailing, our courts would be likely to follow the English decisions in cases arising from negligence, and would uphold the claim for general average.

Rule as to consequences.

All the necessary consequences of a sacrifice must be regarded as the sacrifice itself.[2]

All the immediate and direct consequences of a sacrifice, although these consequences were neither intended nor beneficial, are taken as entering into and forming a part of the sacrifice.[3]

Gourlie says:[4]

> "It may suffice to say, however, that not only all the necessary but many of the unnecessary consequences of the act may be regarded as the act itself. In regard to sacrifices, not only the known, but the conjectural, and in some cases the accidental, results of the original sacrifice are considered to follow it as a logical consequence or extension of the original act."

Examples of this, recognized as general average, are damage done by water going down hatches opened to effect a jettison; damage to cargo lightered in order to float a stranded vessel; and the carrying away of a mast by another which had been cut away.

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[1] *The Caledonia*, 157 U. S., 124.
[2] *Columbian Ins. Co.* v. *Ashby*, 13 Pet., 331 (1839).
[3] Parsons on Maritime Law, p. 304. See *The Wordsworth*, 88 Fed., 313.
[4] Page 13.

In the case of *Norwich & N. Y. Trans. Co.* v. *Ins. Co. of N. A.*,[1] the steamboat *City of Worcester* struck a rock and sprang a serious leak. The master beached her upon what he supposed was hard sand, but it proved to be a soft bottom. Sinking deeper in the grip of the mud, the vessel did not rise with the tide, and the water went through the gangways of the main deck, where the cargo was stowed (as is customary with vessels of that class), and much damage to cargo resulted. The immediate cause of the damage was the mud in which the vessel sank, which was neither known to nor contemplated by the master; but, as the beaching was a justifiable general average act, the Court held that the cargo damage was general average.

In another case, a vessel was cut through by the ice, and to prevent sinking was beached. After the stranding the cargo was badly damaged by large quantities of water which entered the ship through the holes cut by the ice. The Court held that the damage to the cargo was not general average, having been caused by a peril of the sea.[2]

Where a steamer's shaft was fractured at sea, and in order to save towage was temporarily repaired by inserting bolts across the fracture, and later the bolts carried away and extensive damage was done to the machinery, it was held that, as the master expected to reach port with the repaired shaft the further damage was not general average.[3]

The *Somerhill.*

Some further instances of the rule in practice, which have not gone to litigation, may be of interest. *The Somerhill,* in leaving port, stranded in an exposed position in the narrow entrance to the port, her fore part only being aground. The master made hawsers fast to trees on an island in the centre of the entrance, and, fearing that if the vessel floated she might

[1] 118 Fed., 307; 129 Fed., 1006; 194 U. S., 637.
[2] *Fowler* v. *Rathbones,* 12 Wall., 102.
[3] *Van Den Toorn* v. *Leeming,* 70 Fed., 251; 79 Fed., 107.

run over on the rocks at the opposite side before her headway could be checked, he made preparations for dropping the anchors. The hawsers were hove on and the engines worked astern, and when the vessel floated the engines were put ahead and the anchors were dropped to check her sternway, but this did not hold her, and she ran over on the rocks on the other side and was badly damaged. This damage was allowed in general average as a consequence of the act of floating her.

The steamer *Victoria* was moored in an open harbor, when a storm arose and she was in danger of drifting on the rocks; the master, in order to prevent destruction, slipped the anchors, and cast off the moorings and put the engines full speed ahead, for the purpose of running to sea, but before the vessel gained headway she struck on the rocks. The damage occasioned thereby was treated as the consequence of the general average act of running to sea. Several other similar cases have been dealt with in the same manner. The *Victoria*, 1907.

General average is payable where there is only a single interest at stake, as where the vessel is in ballast,[1] and in the case of a yacht.[2] Where vessel in ballast, or vessel and cargo same ownership.

We may conclude that there is little difference in regard to general principles between the American and English law of general average. In recent years there have been some decisions of our courts which show a tendency towards the "physical safety" theory, as being the true basis of general average, and others which favor the "end of the adventure," or "mutual benefit" theory. Conclusion.

The more notable among the former are *Earnmoor S. S. Co.* v. *New Zealand Ins. Co.*,[3] which involves the question of substituted expenses; *Bowring* v. *Thebaud*,[4] where a

[1] *Potter* v. *Ocean Ins. Co.*, 3 Sumner, 27; *Dollar* v. *La Fonciere*, 162 Fed., 563.
[2] *Risley* v. *Ins. Co. of North America*, 189 Fed., 529.
[3] 73 Fed., 867.
[4] 42 Fed., 794; 56 Fed., 520.

vessel was pierced by an unknown obstruction while loading cargo at a dock and required temporary repairs, and it was held that there was no case for general average because there was no peril to ship or cargo, and because of the shipowner's implied warranty of seaworthiness at the time of sailing; and *L'Amerique*,[1] where the vessel stranded near destination, salvors discharged the cargo, which was delivered to consignees, and ten weeks later the vessel was floated: it was held that the salvors' expenses, after discharge of the cargo, were chargeable to the ship alone.

Several important cases have supported the "mutual benefit," or "end of the adventure" theory, where sacrifices or expenses were a continuation of a series of measures taken for the common benefit before any separation of interests whatever, and where the continuation of the voyage was in contemplation, although at the time when some of the measures were taken the cargo was temporarily in a place of safety.

In a case in the Supreme Court,[2] the Court said:

> "Where the whole adventure is saved by the master, as agent of all concerned, the consignments of cargo first unloaded and stored in safety are not relieved from contributing towards the expenses of saving the residue, nor is the cargo in that state of the case relieved from contributing to the expense of saving the ship provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of the whole of the interests and by one continuous series of measures."

A vessel on fire put into a port of refuge, part of the cargo was hurriedly discharged into lighters, and the vessel was then scuttled; she was subsequently raised and proceeded with the cargo remaining in her to destination, the cargo which had been discharged into lighters was forwarded to destination in other

[1] 35 Fed., 835.
[2] *McAndrews* v. *Thatcher*, 3 Wall., 347.

vessels by the carrier; it was held that the cargo which was in safety on lighters must contribute to the losses and expenses resulting from the scuttling. In the judgment of the Circuit Court of Appeals the difference between English and American law is pointed out.[1]

In another case, *The Joseph Farwell*,[2] the Court said:

> "The cargo was liable to contribute for any general average or expenses incurred as long as it was 'at risk.' Physical destruction or direct physical injury to the cargo was not the only risk to which it was exposed. Its value depended, at least is supposed to have depended, in some degree, upon the successful prosecution of the voyage. Until that was broken up, the cargo, although it was separated from the ship, and put in a place of present safety, was not so completely separated from the ship and from the whole adventure as to leave no community of interest remaining. It was not entirely disconnected with the enterprise, and it must be regarded as still 'at risk,' and liable to contribute, if it was still under the control of the master, and liable to be taken again on board for the purpose of being carried to its destined port."

SACRIFICES OF SHIP.

Jettison of ship's stores.

Jettison of ship's stores, hawsers, chains, water casks, etc., is to be contributed for in general average provided the circumstances warrant the sacrifice, and, if they are jettisoned from the deck, provided they were properly stowed on deck.[3] Such sacrifices, however, demand close scrutiny.[4]

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[1] *Reliance Marine Ins. Co.* v. *N. Y. & Cuba Mail S. S. Co.*, 70 Fed., 262; 77 Fed., 317; 165 U. S., 720. See also, *Nelson* v. *Belmont*, 21 N. Y., 36; *Pacific Mail S. S. Co.* v. *The N. Y. & Honduras Mining Co.*, 74 Fed., 564.

[2] 31 Fed., 844.

[3] Gourlie, p. 92.

[4] *The Santa Anna Maria*, 49 Fed., 878.

Anchors and chains.

The loss of anchors or cables abandoned for the common benefit is admitted as general average, but if the anchor was fouled on the bottom so that it could not possibly have been saved, the slipping of it is not considered a sacrifice.[1] If, owing to a peril threatening the adventure, the ship is anchored in an unsafe place and the chain is slipped to get her clear, it is general average.

Anchor let go under unusual conditions.

If, to avoid an impending peril, such as a collision or grounding, an anchor is suddenly let go, while the vessel is under headway, or in the emergency the usual preparations had not been made and the anchor is lost thereby, it is treated as a sacrifice.

In floating stranded vessel.

Damage to anchors and chains used in the efforts to float a stranded vessel is general average.[2]

Press of sail.

Damage by carrying a press of sail is not recognized as general average.[3]

Cutting away masts, spars, etc.

Cutting away of masts, spars and sails to righten a vessel when on her beam ends, or to ease her when ashore, or otherwise to avert some imminent danger, together with all the damage naturally resulting from the fall of the spars, is the subject of general average.[4]

Coal and engine stores bearing away, etc.

Coal and engine stores consumed from the time of bearing up for a port of distress to the time of resuming the voyage are always treated as general average,[5] but not in regaining the position from which the ship deviated.

Voluntary stranding.

Damage caused by voluntary stranding is general average whether the vessel is afterwards saved or is totally lost by the stranding, even where the vessel must inevitably strand but is run ashore in a different place. It is a sufficient ground for

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[1]Gourlie, 195-196.
[2]*Roberts* v. *Ocean Star*, Fed. Cas., 11908.
[3]Phillips Ins., 1296; 2 Parsons Ins., 302; Gourlie, 203.
[4]*Rogers* v. *Mechanics Ins. Co.*, 1 Story, 604, and cases cited at Gourlie, p. 174.
[5]Gourlie, 243.

allowing contribution that the damage sustained by the voluntary act is different in its character or extent.[1]

Lowndes, in the 4th Edition, pages 126-135, has carefully reviewed the leading American decisions; since that edition was issued two cases have come before the American Courts. In one of these, with which I have already dealt,[2] the principle of the earlier cases was reaffirmed in the broadest possible terms.

In the other case, the right to contribution was denied, on the express ground that the testimony showed that soon after the anchor was slipped the vessel stranded in substantially the same place and under the same conditions as would have happened in any event, and with the same result to vessel and cargo; and on the further ground that the only object in stranding the vessel was to save the lives of the crew.[3]

Temporary repairs.

The law of the United States differs in this respect from that of England. Reasonable temporary repairs of damage arising from excepted perils, made at some intermediate port, where permanent repairs cannot be made, if necessary to remove the disability of the ship to proceed on her voyage, are now regarded as general average. Such repairs must be purely temporary in their nature and must serve no permanent purpose.[4] Temporary repairs made solely to save the excessive cost of permanent repairs are not general average.

When permanent repairs can be made at a port of refuge, but at a large expense, and it would necessitate the discharge of cargo and the incurring of heavy general average expenses, and, perhaps, serious damage to cargo in handling, it is the

[1] *Caze* v. *Reilly*, 3 Wash. Cir. Ct. Rep., 298; Fed. Cas., 2538; *Sims* v. *Gurney*, 4 Binney's Penn. Rep., 513; *Gray* v. *Waln*, 2 Serg. & Rawle, 229; *Columbian Ins. Co.* v. *Ashby*, 13 Pet., 343 (U. S. Sup. Ct.); *Barnard* v. *Adams*, 10 How., 270 (U. S. Sup. Ct.); *Star of Hope*, 9 Wall., 203 (U. S. Sup. Ct.); *Sturgis* v. *Cary*, 2 Curt., 59; Fed. Cas., 13, 572; *Rea* v. *Cutler*, 1 Spr., 135, Fed. Cas., 11, 599.

[2] *Norwich & N. Y. Trans. Co.* v. *Ins. Co. of N. A.*, 118 Fed., 307; 129 Fed., 1006; 194 U. S., 637; *ante*, p. 26.

[3] *Shoe* v. *Low Moor Iron Co.*, 46 Fed., 125; 49 Fed., 252.

[4] *Hobson* v. *Lord*, 92 U. S. Sup. Ct., 397; *Bowring* v. *Thebaud*, 42 Fed., 796; *Star of Hope*, 17 Wall., 651; Phillips on Insurance, 5th Ed., Sec. 1500.

practice to treat temporary repairs, made in such cases, as general average; but it is contended by some that repairs in such a case are really substituted expenses, and, in fairness, the cost of such repairs should be apportioned on the saving to all parties, and there is much to be said in favor of this view.

Damage done in extinguishing fire, etc.

Damage done to a vessel in the efforts to extinguish a fire,[1] or in removing a vessel from the vicinity of a fire, is general average.

In salvage operations.

Damage done to a vessel by salvors is general average when the compensation of the salvors is general average. This includes damage done by salving vessels when coming alongside, etc.

Coal and engine stores used up and damage done in floating stranded vessel

Coal and engine stores used up, and damage done to the vessel or her machinery through the efforts to float a stranded vessel, are general average when the vessel is in a position of peril and it is to be reasonably supposed that the possibility of damage was within the contemplation of the master.

Damage to a vessel's bottom, as being attributable to the efforts to float her, is very rarely allowed in general average in this country, for the lack of clear proof that the damage was due solely to the efforts to float and not to the stranding and pounding on the bottom by the action of wind and sea.

State of wreck; wreck cut away.

The practice in the United States differs from that of England with regard to wreck cut away. If a mast or spar should be accidentally carried away and while hanging alongside should threaten the general safety, and therefore should be cut away, allowance is made in general average for the value of the material cut away.[2] In this case the following language of Butler, *J.*, is worth quoting:

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[1] *Nimick* v. *Holmes*, 25 Penn. St., 366; *Ralli* v. *Troop*, 157 U. S., 386; *semble*, *Nelson* v. *Belmont*, 5 Duer (N. Y. Sup. Ct.), 310; *N. Y. & Cuba Mail S. S. Co.* v. *Reliance Mar. Ins. Co.*, 70 Fed., 262; 77 Fed., 317; 165 U. S., 720.

[2] *The Margarethe Blanca*, 12 Fed., 728; 14 Fed., 59 (1882).

> "Was there, at the time, a reasonable chance of saving the property but for the continuance of the storm? If there was, it was not lost, and the casting away of this chance for the common safety was a voluntary sacrifice which will support a claim to contribution."

Similarly, cutting away at sea a rudder torn loose in a gale, and a source of danger, is a general average act.[1]

In adjusting the loss, the value of the material is to be estimated as if it had been recovered from the sea and stowed in safety on board the vessel.[2]

If it is clear that the material could not be saved had the storm immediately subsided, or, if saved, would have had no value, there would be no allowance. Adjusters had before them the difficulty of deciding the proper value to allow for the material cut away. After the *Mary Gibbs* judgment a working scale[3] for such allowances was prepared by the late Captain F. A. Martin, an able expert of the New York Board of Underwriters. This scale is supposed to represent the value of the materials sacrificed, due consideration being given to the possibilities of damage while the wreckage was overboard and to the fact that, even if it were saved, certain expenses would necessarily be incurred.

In dealing with York-Antwerp Rule IV, the American adjusters sometimes give it a liberal construction. If, in cutting away a mast or spar which has previously been carried

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[1] *May* v. *Keystone Yellow Pine Co.*, 117 Fed. Rep., 287.

[2] The *Mary Gibbs*, 22 Fed. Rep., 463 (1884).

[3] Wooden masts and spars overboard, when cut away, no allowance unless clearly shown that they were not broken at the time of the cutting away. Iron masts and spars allowed in full; if known to be broken, no allowance. Iron work on wooden masts and spars, 80%; blocks, 70%; standing rigging, 50%; running rigging, 33 1-3%; sails, 33 1-3%. All of the above to be subject to the usual deduction of one-third new for old. No allowance to be made for the cost of setting up the rigging, or masts and spars, as that would be necessary in any event. The cost of refitting the rigging to be allowed on the same basis as the rigging.

away, and is hanging aloft and a source of danger to the whole adventure, the wreckage falls and breaks the rails, or boats, or does other damage, American adjusters make allowance in general average for the damage done by the falling wreckage, reasoning that the rule was never intended to exclude such damage.

Miscellaneous sacrifices of ship.

Various other acts in the nature of sacrifices are treated as general average: *e. g.*, materials used up in making a temporary rudder or drag, jury mast or jury sails, staving boats or bulwarks to let water out when the decks are flooded, sails used to stop leaks, or let go to righten a vessel and blown away, sails and spars cut away to save a mast when the loss of the mast would endanger the vessel, materials used up in making temporary repairs at sea, damage through tipping a vessel at a port of refuge to make repairs, and the abnormal use of the machinery or the vessel's appurtenances for a purpose for which they were not intended.

Abnormal use of engines.

The following are instances in practice of damage resulting from the abnormal use of engines:

Where, in consequence of a fire at sea, the forehold of a steamer was flooded, which put her down by the head to such an extent that the propeller was largely out of water and the working of the engines under those conditions caused considerable damage to the machinery, which was fairly within the contemplation of the master and engineers, the damage so sustained was made good in general average.

The *Vandalia.* *1907.*

The *Marienfels.* *1909.*

Similarly, in another case, where the foreholds filled when the vessel struck a rock and the engines were worked under the same conditions as in the preceding case, the damage to the machinery and from the straining of the after part of the vessel was allowed in general average.

The *Egremont Castle, 1907.*

Where fire broke out at sea in the afterholds and large volumes of smoke entered the tunnel, and in order to work the

engines it was necessary to close the tunnel door, and it was impossible for men to enter the tunnel to oil the bearings, and the engines were kept going at full speed to reach port, resulting in damage to the bearings through running the engines without oiling them, the damage was allowed in general average. The facts showed that the damage was contemplated.

Damage to pumps.

Damage resulting from the excessive use of pumps in freeing a vessel of water is not general average, the pumps having been used for the purpose for which they were intended. If they are put to an abnormal use it is general average.

A steamer had fire in her cargo of chemicals; the water which was used to extinguish the fire became strongly impregnated with acid, and in pumping it out, the ship's pumps were seriously damaged; the adjusters treated the damage as general average.

On the same principle it would seem that, even if the water had not got into the ship as a result of a sacrifice, the damage to the pumps would be general average.

In conclusion, it would seem that with the exception of so-called wreck cut away and voluntary stranding, the law and practice in America concerning the sacrifices to be allowed are the same as in England.

SACRIFICES OF CARGO.

Jettison.

> "Jettison," says Gourlie,[1] "has ever been regarded as the purest type of a general average act; its only claim to this distinction, however, lies in its being one of the earliest occasions of a general average act."

Jettison of cargo to enable a ship to receive passengers of a vessel in distress is not a general average sacrifice.[2]

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[1] P. 74.
[2] *Dabney* v. *New England, &c., Co.*, 14 Allen, 300.

Jettison to get at fire. Packages on fire.

A jettison made to reach the seat of a fire or to prevent it from spreading is a subject for contribution. Packages jettisoned which are actually on fire are not allowed for.[1] But burnt packages which are no longer on fire are, if jettisoned, allowed for at their estimated value.

Deckload jettison.

When a portion of the cargo is carried on deck in accordance with the custom of the trade, and from the circumstances of the case, the voyage and the character of the deck shipment, such custom is reasonable and just, compensation is due for a necessary jettison of it.[2]

The Average Adjusters' Association of the United States have a rule dealing with this subject.[3]

It would seem that where one shipper loads a full cargo of mixed goods, part on deck, without any special exemption of contribution on the part of the ship, if the deckload be jettisoned the ship must contribute to the jettison.

Jettison of horses carried on deck in accordance with custom is general average.[4]

Poop and deck houses.

Structures not included within the frame of the vessel are considered to be part of the deck.[5]

Lake, sound and river steamers.

Many of the steamers navigating on Long Island Sound, and on the rivers and lakes, are so constructed that the cargo is all necessarily carried on the main deck. In such instances

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[1] *Slater* v. *Hayward Rubber* Co., 26 Conn., 128.

[2] Gourlie, p. 86, and cases cited, p. 87, note 2.

[3] RULE III, DECKLOAD JETTISON. Where cargo consisting of one kind of goods is, in accordance with a custom of the trade, carried on and under deck, that portion of the cargo loaded on deck shall be subject to the same rules of adjustment in case of jettison, or expenses incurred, as if the same were laden under deck.

[4] *Brown* v. *Cornwell*. 1 Root (Conn.), 60 (1773). This is the first decision dealing with general average recorded in any American report.

[5] Gourlie, pp. 83-91, *The Kirkhill*, 99 Fed., 575.

it is treated for purposes of general average as if it were under deck.[1]

Damage done to cargo by water going down the hatches when they have been opened to effect a jettison, is contributed for.[2] Damage through opening of hatches.

Damage done to cargo by water used to extinguish a fire, or by scuttling or sinking the ship, for the same purpose, is allowed in general average. In fact, as Lowndes[3] states, the judgment in *Nimick* v. *Holmes* may be said to have laid the foundation of English law on this subject.[4] There is some qualification of this rule when the steps are taken by the port authorities without the intervention or sanction of the master.[5] Damage in extinguishing fire.

Pending the final decision in *The Jason* case[6] it is very uncertain what effect the fault of the crew has on a claim for contribution arising from fire. Under U. S. Revised Statutes, 4282, the shipowner is not responsible for losses by fire, even though occasioned by fault of the crew. Effect of fault of crew.

Our Courts have held that, although by this statute the shipowner is exempted from direct liability, he must, nevertheless, contribute to sacrifices of the cargo made necessary by fire.[7] Effect of statute exempting shipowner from losses by fire.

Until *The Jason* is decided, it is difficult to say what the law is regarding the liability of the cargo in such a case as respects sacrifices of the vessel. On the authority of the *City of Para*[8] it is certain that in any event there must be contribution among the various cargo owners.

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[1] *Harris* v. *Moody*, 30 N. Y., 266.
[2] Gourlie, p. 113; *The Mary*, 1 Spr. 17.
[3] Fourth Edition, p. 610.
[4] *Ralli* v. *Troop*, 157 U. S., 386; *Nimick* v. *Holmes*, 25 Penn., 366; *Nelson* v. *Belmont*, 5 Duer (N. Y. Sup. Ct.), 310; *N. Y. & Cuba Mail S. S. Co.* v. *Reliance Mar. Ins. Co.*, 70 Fed., 262; 77 Fed., 317; 165 U. S., 720.
720.
[5] *Ante*, pp. 9-10.
[6] *Ante*, p. 20.
[7] *The Roanoke*, 46 Fed., 297; 53 Fed., 370; 59 Fed., 161; *The Rapid Transit*, 52 Fed., 320; *The Santa Ana*, 154 Fed., 800.
[8] 69 Fed., 414; 74 Fed., 564.

Lime cargo on fire.

It has been stated that there can be no contribution when the nature of the cargo is such that, once it has taken fire, there is no possibility of preventing its total destruction. An early case[1] is often incorrectly cited as disallowing contribution in the case of a cargo of lime, but it merely states the foregoing principle. In fact, in a more recent case[2] it was decided that contribution was due for a cargo of lime.

Increase of smoke or fire damage by efforts to extinguish fire.

The spread of fire or smoke damage incidental to proper efforts to extinguish the fire is not general average.[3]

Cargo and ship's materials burnt as fuel.

Cargo or ship's materials used for fuel are treated as general average, provided the ship started on her voyage with an adequate supply of fuel. In determining what is an adequate supply, the quality of the coal, the condition, speed and power of the vessel, the length of the voyage and the season of the year must be given due consideration. Should the supply of fuel become exhausted, not from unfavorable weather, but from the insufficiency of the supply, the vessel is deemed unseaworthy and the parties at fault must pay the penalty arising from their neglect.[4]

Cargo damaged by flooding stranded vessel to ease her.

Damage done to cargo by flooding a stranded vessel to prevent her from pounding to pieces, is general average.[5]

Damage by discharging or lightering cargo.

Where the cost of discharging or lightering cargo is general average, the damage done to the cargo, or shortage of cargo arising from such operations, is always treated as general average. This includes damage by exposure while on lighters, or in landing the cargo on a beach.[6]

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[1] *Crockett* v. *Dodge*, 3 Fairf., 12 Me., 190 (1835).

[2] *The Rapid Transit*, 52 Fed., 320; see also *Columbian Ins. Co.* v. *Ashby*, 13 Pet., p. 331, 340.

[3] *N. Y. & Cuba Mail S. S. Co.* v. *Reliance Marine Ins. Co.*, 70 Fed., 262; 77 Fed., 317; 165 U. S., 720.

[4] *Hurlbut* v. *Turnure*, 76 Fed., 587; 81 Fed., 208.

[5] *Pac. Mail S. S. Co.* v. *Dupre, et als.*, 69 Fed., 414; 74 Fed., 250.

[6] *Hennen* v. *Monroe*, 8 Martin, La., 227 (IV, 449; O. S., 1826); *Lewis* v. *Williams*, 1 Hall, N. Y., 430; Gourlie, 213; *Heyliger* v. *N. Y. F. Ins. Co.*, 11 Johns., R. 85.

Deterioration of, or damage to cargo discharged at a port of refuge, arising from delay, change of climate, wastage, etc., if the same influences would have prevailed had the cargo been retained on shipboard, is not a consequence of the discharge, and is not contributed for.[1] At a port of refuge: damage by delay; change of climate.

If, however, in handling cargo at a port of distress it is exposed to the elements, which would not have been the case had it remained on board, the damage caused thereby is allowed.

When a voyage is broken up at a port of refuge, and the damage to the cargo cannot be distinguished as between the act of discharging and the act of forwarding, it is the practice to allow one-half the damage in general average as caused by the discharge, the other half being attributed to the reloading or forwarding.[2] If, however, the cost of forwarding is general average, the whole of the damage is allowed. When voyage broken up.

When a stranded vessel is in a state of wreck, and there is no contemplation of reuniting ship and cargo, it being a case of *sauve qui peut,* the damage done to cargo in handling is not general average.[3] When in state of wreck.

Damage to cargo by fire, while stored in a warehouse at a port of refuge, is not treated as general average. There is, however, *dictum* to the contrary.[4] To make such an allowance would certainly be an extension of the doctrine of general average. Ordinarily, the risk to cargo of damage by fire is no greater when it is in a warehouse than if it had remained on the vessel, and such loss is in the nature of a second accident. If that were allowable, then a vessel moored at a wharf in a port of distress and damaged by fire communicated from Goods burnt or stolen in warehouse, or lost in salvage operations.

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[1] *Spafford* v. *Dodge,* 14 Mass., 66 (1817); Gourlie, 214.
[2] Gourlie, 216.
[3] *Ibid.*
[4] Brig *Mary,* 1 Sprague, 17 (1841).

the wharf would be equally entitled to contribution for her damage.

Cargo pilfered or stolen, whether from a warehouse, or by stevedores handling it at a port of refuge, or in salvage operations, is in practice allowed.

Cargo shut out at a port of distress.

Where, on account of the lack of proper facilities for restowing cargo which has been discharged at a port of distress, part of it is shut out and is forwarded by another vessel, or sold, the expense or loss arising therefrom is treated as general average.[1]

Voluntary stranding.

Cargo damaged through the voluntary stranding of a vessel is a subject of contribution, but where, after the voluntary stranding, water enters the vessel through holes or leaks existing prior to the voluntary stranding, the damage caused thereby is not recoverable.[2]

Hole made by mast cut away.

Where in cutting away a mast it splinters and tears up the deck, and thereby water gets into the hold and damages the cargo, this damage is contributed for.[3]

Damage through tipping vessel to effect repairs.

Where a vessel is tipped to effect repairs and the cargo is damaged thereby, it is the subject of contribution.

Cargo pumped overboard.

Cargo pumped up at sea in relieving a ship of water (not in the ship as the result of a sacrifice) is not treated as general average, there being no intention on the master's part to make a sacrifice. Where, however, as frequently happens on the Great Lakes, cargo, such as grain, is deliberately pumped overboard by salvage pumps to lighten the vessel, allowance is made in general average.

Passengers' baggage.

Passengers' baggage stored in the ship's compartments, and not in use on the voyage, is contributed for in case of sacrifice.[4]

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[1]Gourlie, 218.
[2]*Fowler* v. *Rathbones*, 12 Wall., 102; *Norwich & N. Y. Trans. Co.* v. *Ins. Co. of N. A.*, 118 Fed., 307; 129 Fed., 1006; 194 U. S., 637.
[3]*Maggrath* v. *Church*, 1 Caines, N. Y., 196; *The Mary*, 1 Sprague 17.
[4]*Heye* v. *North German Lloyd*, 33 Fed., 60.

As Lowndes says:[1] Conclusion.

> "Looked at broadly, then, it may be said that this branch of the law of the United States referring to sacrifices of cargo is identical with our own."

The only difference, apparently, is in the case of cargo damaged through voluntary stranding.

SACRIFICES OF FREIGHT.

Freight lost as a consequence of a general average act or sacrifice is to be contributed for.[2]

EXTRAORDINARY EXPENDITURE.

1. Salvage Charges.

Where the services of salvors are rendered at a time of imminent peril, are continuous, and benefit both vessel and cargo, the compensation paid to the salvors, however or whenever liquidated, is general average.[3] Salvage in general.

For many years a controversy existed in the United States as to whether or not compensation for salvors' services for the common benefit was properly general average. It was argued that when each interest made a separate settlement of the salvors' claims, or the salvage was awarded by the Court, the settlements effected were final and should not be reapportioned as general average. The other view was that the employment of salvors was akin to the jettison of cargo, or to other steps taken to relieve the adventure from peril, in that the object to be attained was the general safety, and it was a general average act.

Salvage liabilities are a lien on the property, and, in incurring them, the master, in effect, makes a sacrifice of the

[1] Fourth Edition, p. 613.

[2] The *Nathaniel Hooper*, 3 Sumner, 543; *Mutual Safety Ins. Co.* v. *Brig George*, Olcott, 89, 157; Fed. Cas., 9981.

[3] The *Jason*, 162 Fed., 56; 178 Fed., 419: This feature of the *Jason* case is not on appeal to the Supreme Court and the law may now be regarded as settled. See, also, *McAndrews* v. *Thatcher*, 3 Wall., 347 (U. S. Sup. Ct.).

property. In earlier days the settlement of salvage claims on cargo was frequently made by a delivery in kind, and in such circumstances allowances would be made in general average for the cargo delivered to the salvors.

The *Jason* stranded, and was floated by salvors and taken to destination with her cargo on board. The services were continuous, and there was no separation of interests. The vessel and cargo interests settled with the salvors separately and on a different basis. In the average statement the entire payments were pooled as general average, and the Court expressly approved this method of equalizing the burden of the salvage expenses.

Life salvage.

The law of the United States differs from English law in that there is no liability for life salvage, although, where the salvors save life in conjunction with property, that fact receives consideration in the Court's award.

If life salvage is incurred in a foreign port, and the vessel completes her voyage to the United States, the amount paid would be recoverable in general average on the theory that there was a lien on the property for it while the vessel and cargo were within the foreign jurisdiction.

Complex salvage operations.

Where, after stranding, the ship and cargo are saved by one continuous series of measures, as, discharging, heaving off the empty vessel and reloading, and the voyage is resumed, all of these expenses are general average.[1] In fact, it may be

[1] *N. Y. & Cuba M. S. S. Co.* v. *Reliance Mar. Ins. Co.*, 70 Fed., 262; 77 Fed., 317; 165 U. S., 720. *McAndrews* v. *Thatcher*, 3 Wall., 347. In the latter case the Court said: "Except when the disaster occurs in the port of destination, or so near it that the voyage may be regarded as ended, the master, if the goods are not perishable, has the right, and if practicable, it is his duty to get off the ship, reload the cargo, and prosecute the voyage to its termination. Where the whole adventure is saved by the master, as the agent of all concerned, the consignments of the cargo first unloaded and stored in safety are not relieved from contributing towards the expenses of saving the residue, nor is the cargo, in that state of the case, relieved from contributing to the expenses of saving the ship, provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures." (p. 371.)

said that even if the voyage is not resumed, and the expenses are incurred while there is still a fair expectation of the continuance of the voyage,[1] the whole of the expenses up to the time the voyage is abandoned are general average, even though, before the ship was floated, the cargo may have been discharged and put in a place of safety.

Where stranded near port of destination.

Where the stranding occurs near the port of destination and the cargo is discharged and delivered to the consignees, and the vessel is subsequently floated, the situation is more difficult.

In *McAndrews* v. *Thatcher*,[2] the ship *Rachel*, bound for New York, stranded during a gale in the Lower Bay of New York. Ineffectual efforts were made to tow the vessel afloat. Salvors were then employed by the master. Being unable to move the vessel otherwise, they discharged the cargo into lighters and transported it to New York, where it was landed in care of the ship's agents, and, on an average bond being signed, was delivered to the consignees. A few days later the salvors abandoned their efforts to save the ship. Thereupon, the underwriters on the ship sent other salvors aboard the vessel. Four days later, the crew having refused duty, the master, being unable to do more than he had done, abandoned the ship and left her where she lay in charge of the agents of the underwriters. The salvors employed by the underwriters succeeded in floating the ship about six weeks later, but at an expense exceeding her value when saved. The shipowners, suing for account of their underwriters, claimed that the entire salvage, including the compensation paid to the salvors employed by the underwriters, after the cargo had been delivered and the master had abandoned the ship, should be treated as general average. The United States Circuit Court for the Southern District of New York upheld this view, but the decision was reversed in the Supreme Court.

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[1] The *Joseph Farwell*, 31 Fed., 844.
[2] 3 Wall., 347.

It was held in the latter Court that the liability of cargo to contribute in general average in favor of the ship does not continue after the cargo has been completely separated from the vessel, so as to leave no community of interest remaining, and that, in the circumstances of the case, community of interest ceased when the master abandoned the ship.

In the course of the opinion, Mr. Justice Clifford considered the contention which was presented, "that if the vessel does not float when the whole cargo is discharged, the subsequent expenses do not concern the cargo, but are particular average on the vessel in the same manner as repairs." He refused to admit it as a correct statement of the rule, saying:[1]

> "Although the stranded vessel may not float, as a consequence of the unlading of the goods, still she may be so lightened by the operation, that the usual appliances at hand may be amply sufficient to enable the master to rescue the vessel without much expense or delay, and put her in a condition to receive back the cargo and transport it to the port of destination; and, in the case supposed, it cannot be doubted that the expense of saving the vessel, as well as the expense of preserving and reloading the cargo, would be the proper subject of general contribution."

Dealing particularly with the case of a stranding in the harbor of the port of destination, Clifford, *J.*,[2] said:

> "So, where the cargo consists of various consignments, and the vessel is stranded in the harbor of the port of destination, it will seldom or never happen that all the consignments will be delivered at the same time. On the contrary, some of necessity will be delivered before others; and yet, if the unlading of the cargo has the effect to make the vessel float, and the whole adven-

[1] 3 Wall., at p. 368.
[2] *Ibid.*

> ture is saved by one continual, unremitted operation, under the directions of the master, as the agent of all concerned, it would seem that the case was one falling directly within the equitable principle of general average, which requires that all the interests shall contribute for the expenses incurred to save the whole adventure from common peril."

In view of this statement of the law it was for many years the practice of adjusters, when a vessel was stranded near her port of destination and the cargo was all discharged, and subsequently the vessel was floated, sometimes after a long delay, to treat the whole of the salvage charges as general average. But in 1888 the correctness of this practice was challenged in the case of *L'Amerique,*[1] which stranded near New York, her destination, and was not floated until some ten weeks after the cargo had been delivered, although the operations were continuous. The United States District Court did not consider *McAndrews* v. *Thatcher* authority for treating, in such a case as *L'Amerique,* the expense of floating the vessel as general average. The case was not appealed, but on its special facts is doubtless correct, though some of the reasoning in the opinion is open to question.

In the interval between the decision in *McAndrews* v. *Thatcher,*[2] and *L'Amerique,*[3] the Supreme Court of the United States decided the case of *The Julia Blake,*[4] in which emphasis was laid on the doctrine that the authority of the master to bind the cargo, in extraordinary emergencies, is limited to cases in which his action may reasonably be expected to be directly or indirectly for the benefit of the cargo, considering the situation in which it has been placed by the accidents of the voyage.

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[1] 35 Fed., 835.
[2] 3 Wall., 347 (1865).
[3] 35 Fed., 835 (1888).
[4] 107 U. S., 418 (1882).

In *L'Amerique,* Brown, *J.,* was called upon to consider the effect of the language above quoted from *McAndrews* v. *Thatcher,* in the light of the subsequent decision in *The Julia Blake.* Starting with the statement of Justice Clifford, in *McAndrews* v. *Thatcher,*[1] that "no interest is compelled to contribute to the loss or expense, which was not benefited by the sacrifice," in substance he found that the expense of salving the ship, after the cargo was removed, exceeded, by two-thirds, the cost of unloading and delivering the cargo to its owners by lighters; and that, accordingly, the cargo's proportion of the subsequent salvage was so very much greater than the benefit which it would have received from the subsequent salvage, by having the ship's value preserved for contributory purposes, that there never could reasonably have been an expectation that the subsequent salvage operation on the ship would benefit the cargo. His findings amount, therefore, to holding that the voyage was in effect broken up by the stranding, and that the community of interests should be deemed to have ended, under the special circumstances, with the unloading of the cargo.

The case of *L'Amerique* does not lay down any fixed rule as to the line of demarcation between cases such as are referred to in the statement of Justice Clifford in *McAndrews* v. *Thatcher,*[2] and that which was before the Court. No definite rule on the subject can be stated with confidence. The result of the decisions seems to be that when a vessel strands near her destination and her cargo is discharged and delivered at destination by lighters, or other similar means, the salvage and other extraordinary expenses up to the time of delivery of the cargo are general average, and the subsequent expenses of floating the ship are chargeable to the ship unless she is floated without much expense or delay after the cargo has been delivered.

[1] 3 Wall., at p. 369.
[2] *Ibid.*

In the latter event all the extraordinary expenses are to be treated as general average.

In the judgment in *L'Amerique,* the Court further states that:

> "after unloading, the subsequent work of forwarding the cargo to its owners in no way concerned the ship or its safety, but the cargo and freight only."

This seems wrong in principle. The Court having decided that the unloading of the ship was a general average act, it seems clear that the general average interest in that act cannot cease until the cargo is taken to a place of safety, which in this instance was its destination; and in practice this expense is dealt with accordingly.

Where not continuous.

Where the services are not continuous and the property is saved by a different series of operations, after a separation of interests, the compensation of the last salvors is not general average to which all interests contribute.[1]

General wreck.

> "In case of a general shipwreck, the essential principle of contribution is wanting, there being no voluntary act done for the common safety of the whole. Consequently, every man must take care of what belongs to him, and must endeavor by his own exertions to save it."[2]

Voluntary salvors.

The compensation paid to voluntary salvors, such as might bring a derelict into port, is not general average.

Specie.

Specie contributes to salvage[3] and general average on the same basis as does other cargo.

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[1] *McAndrews* v. *Thatcher, supra; Pacific Mail S. S. Co.* v. *N. Y. H. & R. Mining Co.,* 69 Fed., 414; 74 Fed., 564 (*The City of Para*).

[2] *Caze* v. *Reilly,* 3 Wash., 298 (1814); Gourlie, 391.

[3] *The St. Paul,* 82 Fed., 104; 86 Fed., 340; *The Mulhouse,* Fed. Cas. 9910.

Credit for ordinary expenses saved.

When the compensation of salvors is general average, a credit must be given for such ordinary expenses as would have been incurred, but have actually been saved by the salvage services.

The Association of Average Adjusters of the United States have a rule dealing with the subject.[1]

EXTRAORDINARY EXPENDITURES.

2. Port of Refuge Expenses.

Principle.

The American law and practice on this subject is now to all intents the same as when laid down in *Campbell* v. *The Alknomac*.[2] As there has been no change in this respect since Lowndes's Fourth Edition, his admirable summary of the subject may be appropriately repeated here.[3]

> "The American law is thoroughly consistent on the subject of port of refuge expenses. Recognizing the seeking of a port of refuge as a sacrifice for the common good, or general average act, it treats all the expenses occasioned thereby as the subjects of general average, and draws no distinction between the expenses of going in and coming out again. This is equally the rule, whether the damage to the ship, which necessitated the seeking of the port, were the result of some other sacrifice, or of an accident. If, indeed, the vessel were to put into port merely to avoid contrary winds, no contribution would be due, this not being a sufficient danger; but if to avoid danger from a tempest the ship was judiciously taken into port, though herself intact, allowance should

[1] V. Where salvage services are rendered to a vessel, or she becomes disabled and is necessarily towed to her port of destination, and the expenses of such towage are allowable in general average, there shall be credited against the allowance such ordinary expenses as would have been incurred, but have been saved by the salvage or towage services.

[2] Bee, 124; Fed. Cas. 2350 (1798), *ante*, p. 2.

[3] Lowndes, 4th Ed., p. 619.

be made(*q*). If a ship goes into port for want of provisions or fuel, the expense is only treated as general average in case it is shown that the ship's original supply was sufficient, and that it had fallen short through some accident.

"The allowance in general average," says Gourlie, "is to be strictly limited to such charges as are a consequence of the putting in. Where the loss is in the nature of a second casualty, not contemplated, nor necessarily connected with the first step, then it is not general average(*r*). For example, if the ship is accidentally damaged by stranding, while attempting to enter a port of refuge, this damage would not be considered general average." On the other hand, it would seem that this principle would not govern the case of a distressed vessel, threatened by a storm, when the master knowingly braves the dangers of an unknown port, and is stranded while attempting the harbourage.(*s*)

Discharging cargo, etc.

The cost of unloading, storing, and reloading cargo, and the damage incident thereto (*ante*, p. 611), are treated as general average (*t*).

(*q*) *Lawrence* v. *Minturn*, 17 How., 100 (1854); Gourlie, 241.

(*r*) Gourlie, 241.

(*s*) The *Star of Hope*, 9 Wall., 203 (1869); Gourlie, 241-243.

(*t*) Gourlie, 278. This appears to be equally the rule whether the cargo is discharged for the common safety at the moment, as because it is not in safety in port while on board, nor the ship safe while it is there, or is merely discharged for the purpose of getting at the inside of the ship to repair accidental damage, the discharging being treated as a necessary part of the act of bearing up in order to effect such repairs. Here the law of America clearly goes beyond the principle laid down in our case of *Svendsen* v. *Wallace*, *ante*, pp. 197-214

"Included therein," says Gourlie, *i. e.*, in the expense of discharging, treated as general average, "is the hire of men breaking out cargo in the ship, as well as the lighterage or transportation to the storehouse, the storage, warehouse rent, or hulkhire, the handling while in store, whether in tiering it up, or subsequently for its better preservation, the fire insurance premium, cost of watchman, agency commission for the care and custody of the merchandise discharged, any repair or replacement to packages, required because of damage received while handled; or, if by reason of the nature of the cargo, or because of the lack of facility for warehousing, it is not stored, then the cost of tarpaulins or other covering, where necessary for its protection; likewise the charges for reloading, and stowage in the ship, these being considered as expenses incurred in direct consequence of the act of deviation, and as a necessary result of the need of repair, and the completion of the adventure. If, however, the condition of the cargo requires the unloading and the repairs necessary to the vessel can be made with-

Putting to sea to escape peril.

Where a vessel is moored in an open port and a storm or some other peril threatens the adventure, and for the general safety the vessel puts out to sea and subsequently returns, the wages and provisions of the crew, or coal and engine stores, or other expenses thereby incurred are in practice treated as general average, the act being akin to putting in to a port of refuge.

Removal to another port for repairs.

Where, after a vessel puts into a port of refuge and it is necessary to effect repairs, and there are no facilities at that port for handling the cargo or for making the repairs, the cost of taking the vessel to another port is treated as general average. If the cargo be discharged at the first port and the vessel is then taken to a second port, unless the damages to the ship were the result of a sacrifice, the cost of removing the vessel to and from the repair port, being for the benefit of the shipowner, is charged to the ship. When the repairs are of both a general and particular average nature, the expenses of removal are apportioned on the basis of the cost of the respective repairs. Wages and keep of the crew during this further prolongation are chargeable to general average on the ground that this delay is but an extension of that incurred from the moment of the voluntary departure from the course of the voyage.[1] The reason a distinction is made under such circumstances between wages and port dues, or removal expenses, is that the latter are deemed to be akin to the towing of a vessel in a port of distress to the shipyard for repairs after the cargo has been discharged.

The charges incurred for the accommodation of passengers

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out a discharge, the cost and expenses above enumerated are charged specially to the cargo. The storage and attendant expenses are general average only up to the time the continuation of the voyage remains in expectancy; when it is decided that it shall be broken up, the storage, etc., is charged entirely to the cargo." The decisions in the courts which have authorized these conclusions are given in Mr. Gourlie's notes.

[1]Gourlie, 245.

landed at intermediate ports in order that the ship may be repaired are for the account of the shipowner.[1] Charges on passengers.

The American law on the subject of substituted expenses is still in an unsatisfactory condition. The number of such cases is constantly increasing and the Courts do not seem disposed to assist in bringing about a solution of what all must consider to be a reasonable procedure. The theory of substituting a lesser loss for a greater is one which should appeal to all interested in the common venture, and every encouragement should be given to the master or shipowner to act on that theory. Certainly the present state of the law, in some instances, affects the course followed. Substituted expenses.

In but one case in our courts has this question been fully considered. That case was in the courts of the State of Maryland, and it is a coincidence that such an important question should be involved in the only recorded decision on general average I can find to have been rendered by the Maryland courts.

The *Mary V. Hugg*,[2] in the course of a voyage from Chili to Baltimore, sprang a leak in bad weather, and put into Rio de Janeiro. The surveyors recommended that "she be lightened, say 400 or 500 tons, and that the same be shipped to port of destination to avoid heavy cost of landing, warehousing and attendant expenses upon the same." Pursuant to this recommendation, 300 tons of cargo were forwarded to destination by another vessel, and the *Mary V. Hugg* proceeded to destination with the remainder of her cargo. The Court decided that these substituted expenses were not general average, but a charge on the freight so far as that would pay it, and if there was any balance it was a charge on the cargo.

The Court quoted, with approval, the following words of Lord Blackburn in *Wilson* v. *Bank of Victoria*:[3]

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[1] *Weston* v. *Train*, 2 Curt., 49; Gourlie, 239.
[2] *Hugg* v. *Baltimore & Cuba S. & M. Co.*, 35 Md., 414 (1872).
[3] L. R., 2 Q. B., 203; 36 L. J. (Q. B.), 89.

> "But, passing by this, we think that the expenses actually incurred must be apportioned according to the facts which actually happened, and that there is no legal principle on which they can be apportioned according to what might have been the facts if a different course had been pursued."

The Court's conclusion was based largely on the statement of law that if the ship was irreparable, the expense of forwarding the cargo was not general average, and, therefore, the forwarding of a portion of the cargo must be governed by the same principle.

In another case,[1] the steamer *Earnmoor,* bound to St. Thomas from Philadelphia, with a cargo of coal, struck a rock in the Delaware River and, to prevent sinking, was run ashore. She was floated after lightering a portion of the cargo, and taken to Wilmington. It was evident that the subsequent repairs to the vessel would occupy considerable time. A survey was held and it was recommended that, in order to avoid greater general average expenses, the voyage be abandoned. By agreement between ship and cargo, to which many of the underwriters on both were parties, the cargo was sold and the loss on freight and cargo resulting from the sale was allowed in general average. An underwriter, who was not a party to the agreement, contended that the loss of freight and cargo resulting from the sale were not general average, and the United States District Court took that view of it. The reasoning of the opinion is very unsatisfactory, the only reference to the doctrine of substituted expenses being a statement to the effect that the sale of cargo as a matter of convenience and from prudential reasons merely, will not be sufficient to make the payment of freight a general average charge.

On the other side of the question we have the following:

[1] *Earnmoor S. S. Co.* v. *New Zealand Ins. Co.,* 73 Fed., 867.

In an opinion of Addison Brown, *J.*, one of our most learned Judges in such matters, in a case[1] where allowance was made in general average for the extra cost of docking cargo when the ship was placed in drydock for repairs with her cargo on board, he used this language:

> "If upon such facts the case is entitled to be treated like one arising in a port of refuge in order to make necessary repairs of damages caused by a sea peril, then, according to the law of this country, the docking of the cargo as an expense substituted in place of unloading and reloading, would be a general average charge as well as merely temporary repairs of the ship."

In another case, the vessel was bound to Chicago with a cargo of lumber. She was damaged in a collision and put into Mackinaw, where she discharged the deckload, made slight repairs, and was towed to Milwaukee, the nearest port of repair, and thence by another tug to Chicago. The Court held that the entire expense was general average.[2]

In considering this subject, the language of Willes, *J.*, and Clifford, *J.*, is appropriate.[3]

The test applied in the *Mary V. Hugg* case[4] does not seem sound in principle. In the case of the irreparable ship the object to be attained was to get the cargo to destination; whereas, in the case before the Court the forwarding of part of the cargo was to save the general interests the greater expense of landing, warehousing, etc.

The whole doctrine of general average is based on the theory of the substitution of a lesser loss (the sacrifice) for a probable greater (accidental) loss. In the case of the substituted expenses the lesser loss equally takes the place of a larger loss

[1] *Bowring* v. *Thebaud*, 42 Fed., at p. 796.
[2] *Goodwillie* v. *McCarthy*, 45 Ill., 186 (1867).
[3] *Ante*, p. 23.
[4] *Ante*, p. 48.

which would have been general average, if incurred. On the principles of equity, which the Courts have ever recognized as underlying the doctrine of general average, the substituted expenses in such circumstances should be general average. If it also saves expenditures, other than those which would be general average, it should necessarily be apportioned on the basis of the expenditure saved.

The injustice of the rule laid down in the *Hugg* case is more apparent in the event of a transhipment, under the same circumstances, of part of the cargo of a ship loaded with general cargo on which the freight is all prepaid. The result of the master's selection of the cargo to be transhipped for the general benefit would be that under this rule the owners of the cargo selected would pay the expenses, and the owners of other cargo would avoid them.

In this connection it is interesting to note that in a case of voluntary stranding[1] the jury were charged, among other things, that if it were found that the master's act was to save the ship and cargo from the *increased expense* of raising the ship in deep water, the act was general average. The Court's charge was approved by the United States Supreme Court.

The question has never been considered by any of the Federal Appellate Courts, but I feel quite confident that, when it is considered, substituted expenses will be recognized as general average, where the expenses saved would be general average. An analogous rule of damages, in another branch of the maritime law, has been approved by the Circuit Court of Appeals.[2]

In practice the doctrine of the *Hugg* case is not always followed. I have known of several cases where, in order to float a stranded vessel, cargo has been discharged into lighters, or into another vessel, and, to save the heavier ex-

[1] *Fowler* v. *Rathbones*, 12 Wall., 102.
[2] *Ronalds* v. *Leiter*, 109 Fed., 905.

pense of reloading, the lighters or vessel containing the discharged cargo have taken it to destination. This expense has been allowed in general average without question by the parties interested.

Owing to the present unsettled state of the law it is advisable to obtain the agreement of the parties interested before adopting a substituted course. This frequently causes delays and expenses which, if the law were clear, might be avoided. I might say that American underwriters readily give their assent to such procedure when the course suggested is reasonable and beneficial.[1]

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[1]Since the foregoing was written, a decision in the United States District Court at Philadelphia involving the question has been reported, *Shoe* v. *Craig*, 189 Fed., 227.

The schooner *Matilda T. Borda*, while on a voyage from Fernandina to Philadelphia, sustained damage to her rudder during heavy weather and sprang a leak; she put in to Charleston, and from there was towed to destination. The arrangement for towing the vessel to destination was made by the managing owner without any conference with the owners of the cargo. The vessel and cargo were both owned in Philadelphia.

The Court found that it was impossible to make the necessary repairs at Charleston, but that the vessel could have been repaired at Savannah, about ninety miles distant; and decided that the towage was not general average, on the ground that the evidence showed that the master and managing owner were acting solely in the interest of the freight, and, further, that under the circumstances of the case the cargo interests should have been consulted.

In the opinion McPherson, *J.*, made the following remarks:

> "(2) Of course the cost of towage from Charleston to Philadelphia would not in any event be a general average charge, strictly so called, but in a proper case it might be what is known as 'a substitute expense.' * * *
>
> "The tendency is apparently toward the allowance of substituted expenses, but the subject needs cautious treatment. In the existing condition of the law I do not believe that a substituted expense is ever allowable in general average unless all parties in interest have first agreed to it. The master's power to bind all interest may properly support such charges, if he has acted in good faith and without the opportunity of consulting those who may be affected by his act. It may easily be impracticable to confer with all the consignees of a general cargo, for example; and circumstances may also be such that he must act promptly on his own judgment without consulting any interest—either ship, freight or cargo; but in these days of easy communication by telegraph and telephone, there is usually no difficulty about consultation, and where this is true I think good faith requires, *prima facie* at least, that notice should be given. In such

Hospital charges.

The quarantine dues on the ship are general average, but hospital charges for sick seamen are not.[1]

Wages and provisions, bearing away, etc.

The wages and provisions of the crew are general average from the time of deviation for the port of distress until the ship sails again on the voyage,[2] but not until she reaches the position from which she deviated.

Wages and keep of cattlemen.

The wages and keep of cattlemen not on the ship's articles are not in practice allowed in general average.

Wages and provisions if voyage abandoned.

If the voyage is abandoned, the wages and provisions are general average only up to the date when the voyage is broken up.[3]

While stranded.

If the ship is accidentally stranded, the wages and keep of the crew during the detention on shore are not as such the subject of general average. If she was voluntarily run ashore for the common safety, the crew's wages and keep during the detention are the subject of general average.[4] If the vessel, while stranded, becomes a general wreck and the crew are retained to assist in saving property, the property saved must contribute to the wages and keep of the crew.[5]

Scale for allowance.

Gourlie[6] gives a scale for the allowance of provisions.

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a situation the lack of any effort to communicate may well furnish ground for the inference that the course actually taken was intended to advance a particular interest, and not the interest of all. In the present case I think this inference should be drawn. As already stated, the course adopted by the master (which was evidently dictated by the managing owner) seems to have been taken in the interest of the freight alone, and therefore the cost cannot be brought into general average."

I see nothing in this decision to cause me to change the views above expressed on this subject, and on the particular facts of the case before the Court its conclusions were undoubtedly correct. In the present state of the law the decision emphasizes the advisability of obtaining the agreement of the interested parties before adopting a substituted course.

[1] *Hathaway* v. *Sun Ins. Co.*, 8 Bosw., 33 (1861); (Gourlie, 240).

[2] *Campbell* v. *The Alknomac*, Bee, 124; Fed. Cas. 2350; *Star of Hope*, 9 Wall., 203; *Hobson* v. *Lord*, 92 U. S., 397; Gourlie, p. 294, and cases cited.

[3] The *Joseph Farwell*, 31 Fed., 844; (Gourlie, 312).

[4] Gourlie, 307, and cases there cited.

[5] *Roberts* v. *Ocean Star*, Fed. Cas. 11908; (Gourlie, p. 316); *Bridge* v. *Niagara Ins. Co.*, 1 Hall (N. Y.) 467.

[6] pp. 599, 601.

Recently, our Average Adjusters Association, after full inquiry, adopted a scale which in practice is now used.[1]

York-Antwerp Rule XI.

A question has arisen as to the construction of York-Antwerp Rule XI, which deals only with the wages and maintenance of the crew while the ship is detained in a port or place, and does not mention the period between the time of deviation and arrival at the port or place. It has been contended that, as the United States law allows the wages and provisions during the deviation, by virtue of York-Antwerp Rule XVIII the wages during that period should be allowed. The better opinion, however, is that Rule XI is intended to deal with the whole subject of the allowance for wages and provisions of the crew, and in practice no allowance is made during the period of deviation.

Wages and provisions of crew, passenger department.

In practice, the wages and provisions of the members of the crew who are solely connected with the passenger department are not allowed in general average. In applying the York-Antwerp Rules they are allowed on the ground that the men employed in the passenger department are part of the crew and that the rule makes no distinction.

When no deviation.

The right to allowance in general average for wages and provisions is not dependent on a deviation. A voluntary *interruption* is the test. Where a vessel was damaged on her way to a port of call, to which she was going for a clearance, and was necessarily detained at the port of call to effect repairs, the

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[1] XII. Allowance in Respect of Provisions.—When allowance is made in general average for provisions of Master, officers and crew the allowance shall be on the following scale:

Master	$1.00 per day.
Officers and Engineers	.75 " "
Crew	.50 " "

This rule shall apply to the Atlantic Coast ports of the United States and to ports in the Gulf of Mexico.

The practice on the Pacific Coast is to make the allowance on the following scale:

Master	$1.50 per day.
Officers and Engineers	.75 " "
Crew	.40 " "

Court held that the wages and provisions during the detention were general average.[1] The same conclusion was reached where a vessel was detained at sea, while constructing a jury rudder[2] to replace one sacrificed.

Coal and engine stores.

Coal and engine stores used up in bearing away for a port of distress, and while there, excepting such as are used solely in connection with repairs, are in practice treated as general average. There has been no decision of our Courts dealing with this subject, but the principle governing the allowance of wages and provisions of the crews seems applicable to the coal and engine stores, and I have never known the right to make the allowance disputed. Allowance is also made when the York-Antwerp Rules govern the case.

Special agent sent to port of distress.

The expenses of the owners' sending a special agent to a port of distress are general average when such procedure is reasonable and his services are for the general benefit,[3] but when after arrival the special agent's services are largely for the benefit of any particular interest, such as looking after repairs to the ship, only such portion of his charge as applies to the services for the general benefit is general average.[4]

Commission on disbursements.

In practice a commission of 2½% is allowed on the general average disbursements for advancing or for retiring drafts.[5]

Interest.

Interest is allowed on the general average disbursements[6] and allowances.[7] This interest is allowed at the legal rate prevailing at the place of adjustment, on disbursements from date of outlay and on allowances, from the date of completion of discharge or abandonment of the voyage, until the probable date of settlement of the average statement.

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[1] *Hobson* v. *Lord*, 92 U. S., 397.
[2] *May* v. *Keystone Yellow Pine Co.*, 117 Fed., 287; see *contra*, Brig *Mary*, 1 Sprague 51.
[3] *Hobson* v. *Lord*, 92 U. S., 397.
[4] *Besse* v. *Hecht*, 85 Fed., 677.
[5] Gourlie, p. 429; The *Eliza Lines*, 102 Fed., 184.
[6] *Sims* v. *Willing*, 8 Ser. & R., 103.
[7] *Brig Mary*, 1 Sprague, 51.

The Average Adjusters Association have a rule dealing with this subject.[1]

On the Great Lakes a distinction is made by some adjusters and underwriters as regards the allowance of commission on disbursements and the commission for collecting and settling the general average. Where the vessel has what is termed on the Lakes a package cargo (general cargo), the allowance is made. Where she has a bulk cargo, such as ore or grain, no allowance whatever is made. This distinction is clearly unwarranted. The principles of general average and the method of adjustment cannot be affected by the nature of the cargo, or the question as to how many are going to contribute. The charge of commission for collecting and settling the general average[2] is now so well established as a matter of law, that the subject is no longer open for discussion.

COST OF RAISING FUNDS.

In case the master of a vessel is not supplied with funds sufficient to defray the expenses at a port of distress, or on application to the owners of the vessel or cargo obtains no relief, and raises the funds by a bottomry or *respondentia* bond, or as a last resort sells a portion of the cargo, then the interest required for the forced loan, with other charges, such as exchange, commissions, etc., or the loss resulting from the sale of the cargo, is apportioned under the name of Cost of Funds, *pro rata,* over the different items of disbursement; and such proportion as falls on the general average charges is included in the contribution.[3]

As these cases are now of so rare occurrence, I do not consider it necessary in this summary to deal with the law govern-

[1] RULE II. Where allowances, sacrifices, or expenditures are charged or made good in general average, interest shall be allowed thereon at the legal rate prevailing at the place of adjustment.

[2] *Barnard* v. *Adams,* 10 How., 270; *Sturgis* v. *Cary,* 2 Curt., 59.

[3] Gourlie, 357, and cases there cited.

ing the master's right to raise funds under bottomry or *respondentia*, or to sell cargo for that purpose. Since the fourth edition of Lowndes there has been no decision in the United States Courts in which there is any important change in the law on these subjects. There is, however, one decision of the United States Supreme Court, which I deem worthy of mention.

The holder of a bottomry bond on vessel and cargo, given to cover the expenses incurred at a port of distress, largely for the repair of the ship, proceeded against the cargo for the uncollected balance, after seizure and sale of the vessel. The Court, in its judgment, exhaustively considered the right of the master to pledge the cargo for expenses incurred for the ship's benefit, when a cheaper course could have been adopted by forwarding the cargo to destination; and emphasized the salutary rule that the master cannot sacrifice the cargo's interest for the ship's benefit, and declared the bond invalid so far as concerned the cargo.[1]

ADJUSTMENT: PLACE AND TIME OF.

Apparently, the law as to the place and time of adjustment is the same as it is in England; that is to say, ordinarily, when the voyage is completed, the port of destination is the proper place, and the adjustment should be prepared as soon as possible after the completion of the voyage.[2] In speaking of the place of adjustment, I refer to the law and rules which should govern it, as it is immaterial where the adjustment is made if it is made promptly and conforms to the laws and rules of the port of destination when the voyage is completed, and is issued in the language prevailing there. It may be of interest to note that a few years ago several average statements on Italian steamers,

[1] The *Julia Blake*, 107 U. S., 418.

[2] *Peters* v. *Warren Ins. Co.*, 3 Sumner 393; S. C.; *Strong* v. *Fireman's Ins. Co.*, 11 Johns., 323; *Barnard* v. *Adams*, 10 Howard, 270.

bound to this country, were prepared in Italy and issued in the Italian language and sent here for collection, but the cargo interests declined to consider them until the shipowners had them translated into English. Ordinarily, when the voyage is completed, and there are competent adjusters at the port of destination, it is more convenient to have the statement actually prepared there, because, obviously, the adjuster at that place is more familiar with the law and practice of his own country than another elsewhere would be.

Where voyage is broken up.

Where the voyage is broken up at an intermediate port, and the cargo is either sold or delivered to its owners, it has been decided that the general average is governed by the law shown to exist there,[1] but under the same circumstances, if the foreign law is not proven in court, our courts will apply our own law and usages.[2]

If a vessel is condemned at a port of refuge, and the master or owners forward the cargo to destination, collect freight and obtain average security at destination, the law of the place of destination must govern the general average statement.[3]

Ship with cargo for more than one port.

When a ship has cargo for two or more ports in different countries or with different laws of average, the case presents some difficulty, and here, as in England, there are no decisions to indicate what law should govern. Some authorities argue for the first port and others for the last. If the cargo is entitled to contribution, the owners of cargo for the first port may take proceedings there against the ship and the remainder of the cargo, obtaining security before the vessel resumes her voyage. If such action is taken and judgment secured according to the law of that port, then upon the vessel's arrival at her final port in this country, the judgment

[1] *National Board of Marine Underwriters* v. *Melchers*, 45 Fed., 643. The *Eliza Lines*, 102 Fed., 184.

[2] *Olivari* v. *Thames & Mersey Mar. Ins. Co.*, 45 Fed., 894.

[3] *Barnard* v. *Adams*, 10 How., 307, U. S., Sup. Ct.; *McLoon* v. *Cummings*, 75 Penn., S. T. Rep., 98; *Bradley* v. *Cargo of Lumber*, 29 Fed., 648.

would be recognized, by comity, by our courts; but where such proceedings are not taken at the intermediate port, the weight of opinion is that the law of the respective ports should be applied to the settlements with the cargo destined to them.

Take for instance, the case of a vessel bound first to a French port and afterwards to a United States port; it does not seem reasonable that, because the shipowner had the liberty or option of stopping at the French port, this fact should operate to cast the burden of a French adjustment on an American consignee. The liberty in the bill of lading to stop at the way port was simply an option for the ship's benefit and to relieve it from liability for deviation, and it is unreasonable to construe such liberty as changing the voyage contracted for into a series of independent voyages so as to alter the law of the contract as respects general average, a wholly independent subject. It is argued that after the vessel delivers her cargo at the first port the values may change because of another accident. As a protection against such an occurrence, the shipowner, who, so far as concerns the cargo for the last port, has exercised the option of going into the first port for his own benefit, may take out insurance against an increase of contribution arising from diminution of values by a subsequent accident, and such insurance is now quite customary in the United States.

In 1902, in the case of the French steamer *Jeanne Conseil* with cargo, on a voyage from Bordeaux to St. Pierre, Miquelon (French) and New York, the vessel broke her shaft and was towed into the Azores. In the average statement, prepared at New York, the St. Pierre cargo was assessed general average on the basis of the French law, and the New York cargo on the basis of New York law, which was the method adopted in a case mentioned by Lowndes.[1] The question as to the correctness of this procedure was submitted to leading coun-

[1] 4th Edition, 274.

sel (two former Judges of the United States District Court at New York) who approved the method adopted.

On account of the differences over this question, many steamship lines, when vessels are bound to various ports, now provide in their bills of lading that the Average Statement shall be made in accordance with the laws and customs of the port of shipment.

ADJUSTMENT.

General Principles Governing Allowances and Contributory Values.

The principles governing the allowances in general average and the contributory values are the same, the theory being that the one whose property is sacrificed shall be placed in exactly the same position as he would be in if the property of another had been selected for the sacrifice, and it is for this reason that amounts made good in general average contribute to general average. As Gourlie says,[1]

> "General average contribution seeks to restore to one whose property has been sacrificed for the common good that which has been so lost to him."

This statement is subject to limitations; for instance, there is no allowance for jettison of deck-load when it is not carried in accordance with the custom of the trade, although it was sacrificed for the common good. In determining the value to be made good, the element of peril existing at time of sacrifice is not considered, for the reason that the same peril and the chances of safety equally existed for the rest of the adventure.[2]

[1] P. 462.
[2] Gourlie, 465; *Rogers* v. *Mechanics Ins. Co.*, 2 Story, 173.

Deduction of one-third new for old.

The practice in the United States in respect to this is the same as when Gourlie's book was written. Where repair is made by the substitution of new material, one-third is deducted as representing the betterment that the ship has received. This deduction is made from the cost of labor and materials employed in the repairs, from the towages to and from dry dock, dry dock dues and all the incidental expenses connected with the repairs other than surveys.[1] The deduction is also made even if the ship is upon her first voyage.[2]

No deduction is made from the cost of straightening bent iron work or where new material is not used. Neither is it made when articles sacrificed are replaced by articles that are not new, nor when ropes and materials sacrificed are perfectly new; that is, when taken fresh from the ship's storehouse and sacrificed before they have been put to their ordinary use. In practice the same deduction is made for iron and steel vessels as for wooden, the injustice of which is quite manifest, and has been frequently commented upon. Gourlie's expectations that there would be a modification in this respect have not yet been realized.[3] The legal decisions on this subject were prior to the advent of iron and steel vessels. While the rule is arbitrary, in the long run it probably works justice in the case of wooden vessels, but it does not do so as regards iron and steel vessels.

A good illustration of the unfairness of the practice at present is where an iron or steel vessel is drydocked on account of voluntary stranding damage, and some of her bottom plating is found to be bent and is straightened. Under those circumstances, the entire cost of the repairs is allowed in general average without deduction. If, however, it developed that

[1] Gourlie, 468, and cases cited.
[2] *Dunham* v. *Com. Ins. Co.*, 11 Johns. C., 315 (1814).
[3] P. 470.

the plating was broken and is replaced by new, one-third is deducted from the entire cost of the repairs, including drydock dues, etc., although the cost of the new material is very much less than the thirds deducted from the total account. Presumably, the ship that has the broken plates is the more seriously damaged, and it seems an absurdity that in that instance the allowance in general average should be less than is made in the case of the ship that sustained the least damage, viz., the ship with the bent iron work. As a distinction has always been recognized in regard to anchors,[1] why should it not be made in the case of iron and steel vessels? It is to be hoped that the practice will be altered in this respect.[2]

Drydock dues, etc.

If the repairs are of both a general and particular average nature and it is necessary to drydock the vessel to effect them, one-half of the cost of taking the vessel to and from drydock in the port of repair, and one-half of that portion of the drydock dues which is common to both classes of repairs are in practice treated as general average.

Credit for old materials.

The practice of deducting a credit for old materials before the deduction of the one-third has in recent years been changed. The credit is now made after the deduction of the one-third, which is correct in principle.

When vessel lost after completion of voyage and sacrifices not replaced.

If, after the voyage has been completed, the ship should be lost before the sacrifices have been replaced or repaired, allowance should be made in general average for the cost of replacing or repairing the sacrifices on the basis of estimates. Similarly, allowance should be made for damage to cargo through a sacrifice, although the cargo was destroyed after delivery.

Amount allowed for cargo sacrificed.

The allowance for cargo sacrificed and the contributing value of cargo are based on the market value at the port of destination at the time of arrival. In practice the value is taken as of

[1] Gourlie, 468.

[2] Since this was written the Association of Average Adjusters of the United States has appointed a special committee to consider the subject.

the last day of discharge. It has been argued by some writers that it should be taken as of the first day of discharge, but, as the community of interest between ship and cargo is finally separated on the last day, the weight of reason is in favor of that date. In this connection it is well to remember that in contributing in general average to salvage expenses, no preference is allowed on account of some consignments of cargo being delivered in advance of others.[1]

Deduction from jettison for damage.

If goods sacrificed were either damaged at the time, or certain to become damaged before the end of the voyage (as, for instance, if the ship after being relieved by jettison was subsequently sunk or filled with water, and it is certain that damage would have been received by the sacrificed goods had they not been sacrificed), only the value which it is assumed this merchandise would have produced if it had not been sacrificed and had stood the vicissitudes of the voyage, is to be allowed.[2] In this event, if similar goods are damaged, the amount allowed for the sacrificed goods is in practice based on the damaged value of the goods that arrive. As Gourlie states,[3] "The claim for contribution is a favored one and, the cargo being sound when sacrificed, no mere presumption will be allowed to destroy the owners' right to an indemnity based upon a full, sound value; but the nature and circumstances of the damage may be such that the extension of such damage to the sacrificed goods had they remained aboard becomes no longer presumption but almost a question of certainty."

Perishable cargo.

Where fruit, or other perishable cargo, is jettisoned or sacrificed, and at the time of the sacrifice is in good condition, but if it had not been sacrificed it would certainly have become worthless before it could arrive at a market, no allowance is made. Such cases are quite frequent in the United States with vessels carrying bananas.

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[1] See p. 28.
[2] Gourlie, p. 480.
[3] P. 481.

If, after jettison, the ship returns to her loading port, and the jettisoned goods are there replaced, the loss by jettison consists of the cost of replacing the goods jettisoned. That sum, therefore, and not the market value at destination, should be made good, as the loss of goods has thereby been converted into a loss of money.[1] If replaced at loading port.

When cargo is damaged by water poured into the hold to extinguish a fire, allowance is made for the water damage to those packages only which were untouched by fire.[2] If the goods damaged by water were also damaged by smoke deduction is made for the latter. No allowance for packages on fire when wetted.

Where the goods on fire are thrown overboard no allowance is made for them,[3] but burnt packages which are no longer on fire, are, if jettisoned, allowed for at their estimated value. Nor when jettisoned.

If the freight is absolutely prepaid, or the cargo is obligated to pay it in any event, the freight is not deducted from the amount allowed for the goods sacrificed,[4] and in such a case no allowance is made to the vessel for freight. Freight when prepaid included in value of goods.

Contribution is made for freight lost as a consequence of a general average sacrifice.[5] Allowance for freight.

No allowance is made for freight on cargo sacrificed if it be a fact that even if the sacrifice had not been made the voyage could not have been completed and the freight earned. Otherwise the shipowner would be a gainer by the sacrifice. If the cargo sacrificed could have been forwarded to destination, and the cost of forwarding would have been less than the original freight, the allowance in general average is for the difference.

If after jettison or sacrifice of cargo the vessel engages new cargo and fills the empty space created by the sacrifice, and completes the voyage she was then on, the net freight received on

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[1] Gourlie, 480.

[2] *Nimick* v. *Holmes*, 25 Penn. St. R., 366; *Nelson* v. *Belmont*, 5 Duer, 310; Gourlie, p. 482.

[3] *Slater* v. *Hayward Rubber Co.*, 26 Ct., 128; *Lee* v. *Grinnell*, 5 Duer, 400; see Gourlie, p. 155.

[4] Gourlie, p. 488; *Maldonado* v. *B. & F. Mar. Ins. Co.*, 182 Fed., 784.

[5] *Nathl. Hooper*, 3 Sumner, 543; *Mutual Safety Ins. Co.* v. *Cargo Brig George*, Olcott, 89; Fed. Cas., 9981.

the new cargo, after deducting the expenses of engaging and loading, it is a credit against the allowance for freight on the cargo sacrificed, but if the voyage is abandoned no credit is made on account of the earnings of the next voyage.

Basis of allowance for freight.

The allowance for freight on cargo sacrificed is based on the bill of lading rate, or, if a bill of lading be not issued, on the rate as per charter. It was the custom formerly to allow the gross freight, without any deduction for the expenses which would have been incurred in earning it, subsequent to the general average act, but which were saved by the sacrifice, although the contributory value was based on a proportionate part of the freight. The propriety of making the allowance on the basis of the gross freight was litigated in several cases, but the Court felt bound by the custom or usage.[1] The unfairness of the usage was, however, manifest, and finally, in the case of *Christal* v. *Flint*,[2] the Court approved the allowance of gross freight as being in accordance with the usage and after pointing out the inequity of the practice, expressed the opinion that this usage of adjusters should be altered. The result of this intimation from the Court was the adoption of a rule by the Average Adjusters Association of the United States.[3]

Interest on sacrifices and expenses.

Interest is allowed in general average on all allowances and disbursements.[4]

CONTRIBUTORY VALUES.

Principle governing.

The sacrifice is to be made good by the different interests in proportion to the share of each in the adventure.

As a matter of principle, the true contributory value of any

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[1] *Natl. Hooper*, 3 *Sumner*, 542; *Columbian Ins. Co.* v. *Ashby*, 13 Peters, 331; *Mutual Safety Ins. Co.* v. *Cargo Brig Geo.*, Olcott, 89; Fed. Cas., 9981.

[2] 82 Fed., 472.

[3] RULE IV.—LOSS OF FREIGHT ON CARGO SACRIFICED.—When loss of freight on cargo sacrificed is allowed in general average, the allowance shall be for the net freight lost, to be ascertained by deducting from the gross freight the expenses that would have been incurred subsequent to the sacrifice to earn it.

[4] *Ante*, p. 58.

interest is the value saved by the sacrifice; that is, the property must contribute according to its value at the time and place at which the contribution becomes due. Contribution for loss by jettison or other sacrifice is contingent upon something finally coming to the use and within the control of the owner, not merely by the temporary success attained by the act, but by the ultimate possession of the property.[1]

I dissent from the statement of Gourlie that "expenditures are due absolutely, regardless of the subsequent fate of the interests for whose benefit they were made,"[2] and have already expressed my conclusions on this subject.[3]

The authorities cited by Gourlie for the proposition quoted are *Spafford* v. *Dodge*,[4] and *Douglas* v. *Moody*.[5] In both these cases contribution was sought in respect of expenses incurred in obtaining the release of captured vessels and cargoes.

So far as this point is concerned, opinions to the effect above quoted were expressed by the Judges who wrote the judgments, but since, in both cases, the ships and the cargoes arrived safely at destination, the statements obviously are merely *dicta*. In neither case was the Court called upon to decide, nor did it decide, that contribution for expenditures made at a port of refuge is due absolutely in case of the subsequent total loss of the property. So far, therefore, as the actual decisions in these cases are concerned, they are not authority for the proposition that any greater liability exists to contribute for extraordinary expenditures than for sacrifices.

The case of *Spafford* v. *Dodge* no doubt did decide the point stated by Gourlie that, "legally, then, there are two rules of valuation, the one applicable to cases of expenditure, the other to sacrifices of property,"[2] but the ruling in *Spafford* v.

[1] Gourlie, p. 521; *Lee* v. *Grinnell*, 5 Duer, 400; *Barnard* v. *Adams*, 10 How., 270, 370; *The Star of Hope*, 9 Wall., 235; *Hobson* v. *Lord*, 92 U. S., 397.
[2] Gourlie, p. 521.
[3] *Ante*, pp. 13-15.
[4] 14 Mass., 66 (1817).
[5] 9 Mass., 548 (1813).
[6] Gourlie, p. 522.

Dodge, and the *dictum* to the same effect in *Douglas* v. *Moody,*[1] that contribution for extraordinary expenditure should be made on the basis of the values at the port of expenditure, are at variance with the decisions in the State of New York and in the Federal Courts, and must, therefore, be deemed to be overruled on this point.[2]

Contributory value of ship.

In the early days, in some of the States, it was usual to take as the basis of the ship's value, not her full value, but some fraction, *e. g.,* in New York State four-fifths.[3] This suggests the continental origin of our early law. Now, however, the law and practice is that the vessel contributes to general average on the basis of its value upon arrival at the port of discharge in its then condition.

The following statement of Gourlie fully covers the subject:[4]

> "The vessel is to be valued upon arrival at the port of discharge in her then condition.
>
> From the value thus ascertained is to be deducted the cost of any repairs or other work done subsequent to the sacrifice for which contribution is sought; addition then being made of any allowances to the vessel in general average for sacrifices of ship's material."

Cargo.

When cargo is delivered at destination it contributes on the basis of the gross wholesale selling market value in its landed condition. From that value is deducted the freight, if it is not absolutely prepaid or must be paid in any event, and the landing charges and brokerage, if paid, and cash discount, if any. The value is also diminished by any special charges incurred in consequence of damage. The value of the cargo, as previously explained,[5] is taken as of the last date of discharge. Sales to arrive are not considered.[6]

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[1] 9 Mass., 548.
[2] *Lee* v. *Grinnell,* 5 Duer, 400; *Barnard* v. *Adams,* 10 How., 270; *The Star of Hope,* 9 Wall., 235; *Hobson* v. *Lord,* 92 U. S., 397, 405-411.
[3] *Leavenworth* v. *Delafield,* 1 Caines, 573 (1804).
[4] Gourlie, pp. 522, 523.
[5] *Ante,* p. 63.
[6] Gourlie, 564.

Where the voyage is broken up and the general average is adjusted as of the port of refuge, the value there is used, and, in practice, unless the cargo is sold at the port of refuge, it is assumed to be the value at the port of destination less the cost of forwarding. Where voyage broken up.

Frequently the cargoes of regular line steamers in the coasting trade consist of several thousand small shipments, which merchandise is not intended for wholesale distribution. In such cases it is the custom to base the contribution on the invoice value, including prepaid freight and shipping charges, if any. Where the goods are staples, such as cotton and lumber, the market values at destination are readily obtainable, and they are used. Coasting trade and outward foreign voyages.

Many averages are stated in America on vessels bound to ports in the West Indies, Central and South America and the Far East, where the obtaining of accurate market values is difficult. In such cases it is the practice to assume the market value to be invoice value plus shipping charges and 10% for profit; to this is added prepaid freight. If the goods are staples, such as lumber, coal, cotton, sheetings and case oil, market values are obtainable and are used. If the goods are manufactured for a special order, such as machinery and railroad material, invoice value, shipping charges and prepaid freight are used as representing the actual value, and this practice is generally approved.

The rough-and-ready practice still exists of deducting from the freight a certain percentage, varying in the different States,[1] Freight.

[1]Maine	one-third.	South Carolina	one-third.
New Hampshire	"	Georgia	one-half.
Massachusetts	"	Florida	"
Rhode Island	"	Alabama	"
Connecticut	"	Louisiana	one-third.
New York	one-half.	Texas	one-half.
Pennsylvania	one-third.	California	"
Delaware	"	Ohio	"
Maryland	"	Illinois	"
Virginia	one-half.	Michigan	"
North Carolina	"	Wisconsin	"

On the Great Lakes the custom is to deduct one-half, regardless of the State to which the vessel is bound.

to cover such expenses of earning it as were incurred subsequent to the general average act. This practice is indefensible on any principle of general average. Gourlie says that, while it cannot be regarded as strictly equitable, it certainly has the merit of practicability and convenience.

It is our daily practice to calculate the contributory value of freight under the York-Antwerp Rules, and we have not found that method impracticable or inconvenient. As Lowndes says,[1] a uniform deduction of a percentage does not even roughly approximate to a correct result. The sacrifice might happen at the beginning of the voyage when, if the net value is determined scientifically, there will be little to contribute; or at the end of the voyage, when the deduction to be made would be very little. Our Courts have supported this rule solely on the ground of its being the usage. It is to be hoped that in the near future the practice will be changed.[2]

Freight contributes to general average on the basis of the bill of lading freight collectible at destination on cargo on board at the time of the general average act. In the absence of any provision in the bill of lading, it is at the rate as per charter party.

Freight prepaid.

Freight prepaid absolutely, or payable by the cargo, in any event, contributes in the value of the cargo, without deduction.[3]

Chartered freight.

As regards chartered freight, we are no farther advanced than we were at the time of Gourlie's book, thirty years ago.

There are no decisions of our Courts covering the question when the vessel is under charter and proceeding in ballast, and it is not the practice in those circumstances to make the chartered freight contribute to general average, differing in this respect from the law in England.

In 1905, a proposed rule was considered by our Average Adjusters Association, which provided that the chartered freight was to contribute when the vessel was in ballast, but after a full discussion the proposed rule was unanimously voted down.

[1] 4th Ed., p. 633.

[2] Since this was written the Association of Average Adjusters of the United States has appointed a special committee to consider the subject.

[3] *Maldonado* v. *B. & F. Mar. Ins. Co.*, 182 Fed., 744; Gourlie, p. 538.

The case of the *Brig Mary*[1] is often mentioned as authority for the contribution, but I think it is readily distinguished from the case of a vessel in ballast. In the case of *The Mary,* the vessel was chartered for a round voyage and carried cargo out and home, and the payment of freight was predicated on the return to the home port. This to all intents and purposes is the same form of charter as is now frequently employed by which a vessel for a fixed lump sum carries cargo to various ports, the lump sum being paid upon the discharge at the final port. In this event if a general average had arisen at any stage of the voyage where cargo is on board, the entire freight would contribute. This is an entirely different state of affairs from that where the vessel is in ballast and the charter may be speculative, or, through the exercise of some option in the charter party after the general average had arisen, the charter may never be entered upon.[2]

If the shipowner's freight is less than the bill of lading freight, for convenience in stating the contributing interests the bill of lading freight is frequently divided between shipowner and charterers.

Contribution of amount made good to freight.

While the general rule is that amounts made good contribute to general average, there is one exception in regard to freight which is worth mentioning. In stating the contributory value of freight under York-Antwerp Rules, it is the practice to add the amount made good for freight to the amount of freight collectible at destination, and then to deduct the wages, port charges, etc. The result in some instances is that where the vessel is making an expensive voyage with a small freight list the expenses deducted exceed the freight collectible and the amount made good, and there is no contribution. The reason for this is that if the amount made good contributed re-

[1] 1 Sprague, 17.

[2] The reasons underlying the American practice of confining the contribution to the freight on the cargo on board are fully set out in the Report of the Association of Average Adjusters of the United States for 1905.

gardless of the deduction for expenses, the shipowner would not be in so good a position as he would have been if the property of another had been sacrificed.

Passage money.

Passage money does not in practice contribute to general average for the reason that it is prepaid. There are no decisions in the United States on the subject.

Government property.

Merchandise or stores, the property of the Government, contribute to general average the same as does other cargo.[1]

When two general averages on same voyage.

When there are two general averages on the same voyage the practice is to apportion the second general average first on the basis of the arrived values, and the proportions of general average thus determined are deducted from the contributory values to the first general average.

REMEDY AND EFFECT OF LIEN.

A claim for general average is enforceable in equity proceedings,[2] or by a suit *in personam* in admiralty; it may also be enforced at common law when the proceeding is under an average bond or agreement.[3]

The shipowner has a lien on the cargo for general average, and the owner of goods sacrificed has a lien against the vessel and other interests for the amount due him; both liens are enforceable in admiralty.[4]

The lien on cargo depends upon possession, and is lost by delivery to its owner, or consignee,[5] but if properly reserved it would follow the goods.[6]

Average security.

The questions of security for general average, right of lien, and the master's right to hold the cargo pending the giving

[1] *U. S.* v. *Wilder*, 3 Sumner, 308. See cases cited by Gourlie, p. 582.

[2] *Sturgis* v. *Cary*, 2 Curt., 59; *Mitchell Trans. Co.* v. *Patterson*, 22 Fed., 49; *Dupont* v. *Vance*, 19 How., 162; Bark *San Fernando* v. *Jackson*, 12 Fed., 341.

[3] *Wellman* v. *Morse*, 76 Fed., 573; *Marwick* v. *Rogers*, 163 Mass., 50.

[4] *Ralli* v. *Troop*, 157 U. S., at p. 400; *Dupont* v. *Vance*, *supra*; *Wellman* v. *Morse*, *supra*.

[5] *The Water Witch's cargo*, 29 Fed., 159.

[6] *Wellman* v. *Morse*, *supra*.

of proper security were exhaustively considered, with a full review of the authorities, by the Circuit Court of Appeals in 1896 in the case of *Wellman* v. *Morse*. In the course of the judgment the Court said:

> "With reference to the payment of general average the owners of the schooner were, according to strict law, theoretically entitled to receive it in cash before surrendering their lien, and were not holden to take security for it; and the owners of the cargo were likewise, by the same strict law, entitled theoretically to pay in money instead of giving security. Although, according to strict law, the right to payment of general average does not, perhaps, always await a discharge of the cargo (Carv. Carr. by Sea, 426-428), yet no admiralty court would enforce payment prior to an opportunity for its inspection by its owner for the purpose of determining its contributory value. This, nevertheless, would not prevent the filing of a libel in season to make good the lien if it became necessary. So that, practically, a prior discharge of the cargo is, in any event, necessary to enable the owner of the vessel to collect the amount due for general average. It was on this account well said, referring to payments alike for freight and general average, in Abb. Shipp. (13th Ed.) 466, as follows:
>
> > 'The master, however, cannot detain the goods on board the ship until these payments are made, as the merchant would then have no opportunity of examining their condition.'
>
> Also, with reference to general average, it is expressly stated in Lown. Gen. Av. (4th Ed.) 329, that if the master 'retains the goods on board his ship he can claim no demurrage during the delay.' All the authorities, as well as the reason of the law and the necessities of commerce, are to the same effect. . . .
>
> But a complete disposition of the case requires us to come somewhat nearer to the facts. We have already observed that, in the theory of the law, either party had the right to exact a cash settlement of the general

average, and neither was holden, on the one side to give security, or on the other to accept it. Nevertheless, the almost universal practice is for the master, before delivering the goods, to take an average bond, and for the owners of the cargo to give such a bond. It is not necessary to enlarge on this. The reasons for it, if any one deems them necessary to be stated, can be found in Kay, Shipm. (2d Ed.) 201; Lown. Gen. Av. (4th Ed.) 336, 337; Huth *v.* Lamport (already cited) 16 Q. B. Div. 735, 736; and Svendsen *v.* Wallace (already cited) 10 App. Cas. 404, 410. Indeed, the theoretical remedy of a cash settlement is so impracticable that Lowndes states, in substance, that something else is imperative. He says, indeed, that some other reasonable arrangement therefor 'has to be come to.' The conditions are so urgent, and the practice of giving and accepting security is so universal, that an admiralty court would look with disfavor, so far as in its power to do so, on any owner, either of a vessel or cargo, who refused to conform to it. . . . . .

First, it was held that, inasmuch as the parties had waived their strict rights with reference to immediate payment, and each party had impliedly consented to conform to the usage by virtue of which an average bond was to be given and taken, the owner of the vessel was, in the eyes of the law, liable for refusing an average bond in a reasonable form, and insisting that it should contain unreasonable conditions. . . . . .

On the other hand it is evident, reciprocally, that the master, on surrendering his lien, is entitled to demand security of an effectual character, and of such nature as will leave open, in his behalf, all legal methods of determining any controversy which may arise, and of promptly enforcing whatever amount the result of such determination may show he is entitled to. While, on the one hand, he cannot foreclose any questions which the owner of the cargo is entitled to have determined, he, on the other, is not required to weaken his position substantially, or to surrender any methods of relief, or to delay

it, except so far as the same may be unavoidable in view of the fact that he gives up his lien."

Form of average security obtainable.

According to invariable custom in the United States, before the delivery of the merchandise, the consignees sign an average bond or agreement, and, in addition, furnish a satisfactory guarantee. This guarantee is unlimited and is an absolute obligation to pay any average charges for which the particular shipment is liable. It is customary to accept the guarantee of underwriters legally doing business in the United States, or the guarantee of bankers or other satisfactory sureties.

Deposits.

When such guarantees are not available, a deposit is made with the trustees named in the average bond, who are usually the average adjusters.

A demand for a deposit cannot be legally enforced in this country, because if the demand is made, the consignee, by a writ of replevin, can obtain possession of his merchandise by signing a bond and giving security to the satisfaction of the Court; or, if the master takes action in Court to exercise his lien, the same result would ensue.

But in actual practice, where it is not convenient to give the guarantee mentioned above, the consignees usually prefer to make the deposit rather than to resort to the Court procedure.

The deposits taken are placed in trust accounts and the interest earned on them is credited in the average statement.

When the shipowner places deposits in bank with his general funds, he is liable for interest on them at the legal rate, which in New York is 6% per annum.

Average bond or agreement.

The form of average bond generally in use in the United States contains a brief recital of the alleged facts which gave rise to the general average; it names the trustees, and also the average adjusters who are to prepare the adjustment; and the parties thereto agree to furnish promptly to the adjusters such information as the latter may require in preparing the statement; it also provides for payment of what is due on condition

that the statement is prepared in accordance with established laws and usages in similar cases. The execution of the average bond in no way prevents the cargo owner from contesting his liability for contribution, nor from showing that the general average loss occurred by reason of negligence or of unseaworthiness of the vessel; nor does it prevent him from inquiring whether the rule of apportionment adopted was in accordance with maritime law.[1]

A cesser clause in a charter party does not relieve the charterer, who is also the owner of the cargo, from the obligation to contribute. The obligation springs from the law itself, and not from any contract.[2]

Money paid voluntarily upon a claim for general average cannot be recovered back.[3] It is otherwise if the money is paid under protest to the master to obtain possession of the cargo held on an unfounded claim for general average.[4]

A statement of average adjusters, made up pursuant to average bonds, is not conclusive as an award on submission to arbitrators.[5]

Duty to have adjustment prepared.

The duty of having the adjustment made promptly, enforcing payments and exercising the lien to secure contributions from the cargo before its delivery, rests upon the master, or the owners of the vessel; and the lien must be exercised not only for the protection of the vessel but of the other property entitled to contribution, and the master or the owners are liable for neglect of this duty.[6]

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[1] *Conrad* v. *Montcourt*, 138 Mo., 311; *Berry Coal Co.* v. *Chicago, etc., R. Co.*, 116 Mo., App., 214; *Broadnax* v. *Cheraw, etc.*, C. R., 157 Pa. St., 140; *L'Amerique*, 35 Fed., 835; *McAndrews* v. *Thatcher, supra; Wellman* v. *Morse, supra.*

[2] *Marwick* v. *Rogers*, 163 Mass., 50.

[3] *Martin* v. *The Agathe*, 71 Fed., 528; *Phipps* v. *The Nicanor*, 44 Fed., 504.

[4] *Chamberlain* v. *Reed*, 13 Me., 357.

[5] *The Santa Anna Maria*, 49 Fed., 878; *The Alpine*, 23 Fed., 815.

[6] *Dupont* v. *Vance*, 19 How., 174; *Strong* v. *N. Y. Fireman's Ins. Co.*, 11 Johns., 323; *The Packet*, 3 Mason, 261; *Gillett* v. *Ellis*, 11 Ill., 519; *Heye* v. *North German Lloyd*, 33 Fed., 60; *The Allianca*, 64 Fed., 871; *The Santa Ana*, 154 Fed., 800.

THE ADJUSTER.

As Gourlie observes,[1] "In this country, as in England, the average adjuster occupies a peculiar and anomalous position." He is merely an expert, invested with no judicial authority, and is appointed, generally, by the representatives of the ship. His work is subject to review by the parties interested, and, therefore, his adjustment is not conclusive.

There are, however, certain points of difference between the work of the average adjuster in England and in the United States. Usually, in this country, the shipowner regards the adjuster as his adviser in practically all matters connected with the accident. He almost invariably communicates with the adjuster promptly on receipt of particulars of the accident; he requires his advice in matters of salvage assistance, and frequently the adjuster negotiates the contract with the salvor for sending assistance, and, later, the settlement of the salvor's claim, which requires him to take statements of facts and to confer with underwriters and others interested. If it is a case involving the handling of cargo damaged by a sacrifice, or of general shipwreck, the owner expects the adjuster to assume the full responsibility for the handling and disposition of the cargo, and the proper distribution of the proceeds. The adjuster takes the average security from the owners and underwriters of the cargo, and acts as trustee under the average bond or agreement. He collects the cargo valuations and, after the average statement is completed, has the burden of making the collections and the responsibility of paying out the credit balances in exchange for the documents of title. If any of the features of the case involve litigation he is supposed to attend to and supervise such litigation.

As I understand it, in England the scope of the adjuster's work is not so extensive.

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[1] Page 422.

The services and disbursements of average adjusters, rendered in accordance with the terms of an average bond, or agreement, are maritime in their nature and the subject of proceedings in admiralty.[1]

Commission for collecting and settling general average.

A commission of 2½% is allowed on the total of the general average for the collection and settling of the average.[2] This commission is not allowed merely as a matter of usage, but as a matter of law.[3]

As the collection and settlement of the average is invariably attended to by the adjuster he receives this commission. If the ship's agents performed the service they would be entitled to it.

[1] *Coast Wrecking Co.* v. *Phœnix Ins. Co.*, 7 Fed., 236; 13 Fed., 127, 382.
[2] *Barnard* v. *Adams*, 10 How., 270; *Sturgis* v. *Cary*, 2 Curt., 59.
[3] *Sturgis* v. *Cary*, *supra*.

APPENDIX.

ASSOCIATION OF AVERAGE ADJUSTERS OF THE UNITED STATES.

RULES OF PRACTICE.

I.

COMPENSATION AND EXPENSES OF MASTER.

Adopted February 17, 1885.

Where the voyage is broken up by reason of shipwreck or condemnation of the ship at a place short of the port of destination, the master shall be entitled to compensation from the general interests for the time necessarily occupied by him in transacting the business growing out of the disaster until his departure thence for the home port with the proceeds, general accounts and vouchers.

He shall also be entitled to a reasonable indemnification for his necessary expenses and services in returning to the home port when needed or required, by the peculiar circumstances of the case, to justify his acts at the place of disaster, or to give information, not otherwise afforded, to finally adjust and apportion the average charges to be paid by the general or special interests for whom such services are performed, to be determined by the nature of the case.

These rules shall apply whether the vessel be in ballast or with cargo.

II.

INTEREST ON ALLOWANCES IN GENERAL AVERAGE.

Adopted April 21, 1885.

Where allowances, sacrifices or expenditures are charged or made good in general average, interest shall be allowed thereon at the legal rate prevailing at the place of adjustment.

III.

Deck Load Jettison.

Adopted October 9, 1894.

Where cargo consisting of one kind of goods is, in accordance with a custom of trade, carried on and under deck, that portion of the cargo loaded on deck shall be subject to the same rules of adjustment in case of jettison and expenses incurred, as if the same were laden under deck.

IV.

Loss of Freight on Cargo Sacrificed.

Adopted January 16, 1900.

When loss of freight on cargo sacrificed is allowed in general average, the allowance shall be for the net freight lost, to be ascertained by deducting from the gross freight the expenses that would have been incurred subsequent to the sacrifice to earn it.

V.

Credit for Expenses Saved by Salvage Services, etc.

Adopted October 9, 1902.

When salvage services are rendered to a vessel, or she becomes disabled and is necessarily towed to her port of destination, and the expenses of such towage are allowable in general average, there shall be credited against the allowance such ordinary expenses as would have been incurred, but have been saved by the salvage or towage services.

VI.

Credits for Old Material.

Adopted October 13, 1910.

Where old material is replaced by new, credit shall be given in the average statement for the value or proceeds of the old

material, or, if there is no credit, the Adjuster shall insert a note in explanation.

VII.

Approval of Repair Accounts.

Adopted October 13, 1910.

All repair accounts shall be examined, when practicable, by the owners' surveyor and a surveyor for underwriters before the statement is issued.

The Adjuster shall insert a note in the average statement that this has been done and the result of same.

VIII.

Scraping and Painting Bottom of Vessel.

Adopted October 13, 1910.

The cost of scraping and painting the bottom of a vessel consequent upon repairs which are recoverable in average shall be allowed, unless the vessel, at the time of drydocking, is due in the ordinary course for bottom painting, according to the custom of the owners, or, in the case of a vessel employed in salt water navigation, unless the bottom has not been painted within one year.

When the cost of scraping and painting the bottom is allowed, the Adjuster shall insert a note in the average statement giving the date of the last painting and the date on which, in the ordinary course, the vessel would have been due for repainting bottom.

IX.

Drydocking Charges and Expenses Incidental to Drydocking—Particular Average.

Adopted October 13, 1910.

When a vessel is drydocked:

(1) For owners' account and repairs are found necessary for which underwriters are liable and which can only be effected in drydock; or

(2) For survey and/or repairs for which underwriters are liable and repairs for owners' account are made which are immediately necessary for her seaworthiness, or she is due for ordinary drydocking (in accordance with the owners' custom),

the cost of removing the vessel to and from the drydock, of docking and undocking, and as much of the dock dues as is common to both classes of work, shall be divided equally between the owners and underwriters.

When the vessel is drydocked for underwriters' account and the owners avail of her being drydocked to scrape and paint or to do other work for their own account which is not immediately necessary for seaworthiness, all the expense incidental to the drydocking of the vessel shall be charged to the underwriters.

The Adjuster shall insert a note in the average statement in explanation of the allowances made.

X.

Overtime Work—Particular Average.

Adopted October 13, 1910.

The bonus or extra cost for overtime work on repairs shall be allowed up to the amount of the saving of drydock dues or other charges, which otherwise would have been incurred.

The Adjuster shall insert a note in the average statement in explanation of the allowances made.

XI.

Temporary Repairs—Particular Average.

Adopted October 13, 1910.

The cost of reasonable temporary repairs shall be allowed:

When made in order to effect a saving in the cost of permanent repairs;

When complete repairs cannot be made at the port where the vessel is;

When the material or parts necessary for permanent repairs are unobtainable at the port where the vessel is, except after unreasonable delay.

The Adjuster shall insert a note in the average statement in explanation of the allowances made.

XII.

Allowance in Respect of Provisions.

Adopted October 13, 1910.

When allowance is made in general average for provisions of Master, officers and crew the allowance shall be on the following scale:

Master	$1.00 per day.
Officers and Engineers.....	.75 " "
Crew	.50 " "

This rule shall apply to the Atlantic Coast ports of the United States and to ports in the Gulf of Mexico.

YORK-ANTWERP RULES, 1890.

Rule I.—Jettison of Deck Cargo.

No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

Rule II.—Damage by Jettison and Sacrifice for the Common Safety.

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

Rule III.—Extinguishing Fire on Shipboard.

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

Rule IV.—Cutting Away Wreck.

Loss or damage caused by cutting away the wreck or remains of spars, or other things which have previously been carried away by sea-peril, shall not be made good as general average.

Rule V.—Voluntary Stranding.

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to ship, cargo, and freight, or any of them, by such intentional running on shore shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

Rule VI.—Carrying Press of Sail—Damage to or Loss of Sails.

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

Rule VII.—Damage to Engines in Refloating a Ship.

Damage caused to machinery and boilers of a ship, which is ashore in a position of peril, endeavoring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

Rule VIII.—Expenses Lightening a Ship when Ashore, and Consequent Damage.

When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

Rule IX.—Cargo, Ship's Materials, and Stores Burnt for Fuel.

Cargo, ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the ship-owner and credited to the general average.

Rule X.—Expenses at Port of Refuge, &c.

(*a*).—When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average; and when she shall have sailed thence with her original cargo or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(*b*).—The cost of discharging cargo from a ship, whether at a port or place of loading, call, or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(*c*).—Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original

voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average.

(*d*).—If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved), shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

Rule XI.—Wages and Maintenance of Crew in Port of Refuge, &c.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of repairs, mentioned in Rule X, the wages payable to the Master, Officers, and Crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the Master, Officers, and Crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

Rule XII.—Damage to Cargo in Discharging, &c.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made

good as general average, when and only when the cost of those measures respectively is admitted as general average.

RULE XIII.—DEDUCTIONS FROM COST OF REPAIRS.

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz.—

In the case of **iron or steel ships,** from date of original register to the date of accident,—

Up to 1 year old (A.)	All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.
Between 1 & 3 years (B.)	One-third to be deducted off repairs to and renewal of Woodwork of Hull, Masts and Spars, Furniture, Upholstery, Crockery, Metal and Glassware, also Sails, Rigging, Ropes, Sheets, and Hawsers (other than wire and chain), Awnings, Covers, and Painting. One-sixth to be deducted off Wire Rigging, Wire Ropes and Wire Hawsers, Chain Cables and Chains, Donkey Engines, Steam Winches and connections, Steam Cranes and connections; other repairs in full.
Between 3 & 6 years (C.)	Deductions as above under Clause **B,** except that one-sixth be deducted off Ironwork of Masts and Spars, and Machinery (inclusive of boilers and their mountings).
Between 6 & 10 years (D.)	Deductions as above under Clause **C,** except that one-third be deducted off Ironwork of Masts and Spars, repairs to and renewal of all Machinery (inclusive of boilers and their mountings), and all Hawsers, Ropes, Sheets, and Rigging.
Between 10 & 15 years (E.)	One-third to be deducted off all repairs and renewals, except Ironwork of Hull and Cementing and Chain Cables, from which one-sixth to be deducted. Anchors to be allowed in full.

Over 15 years (F.)	One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off Chain Cables.
Generally (G.)	The deductions (except as to Provisions and Stores, Machinery, and Boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and Provisions and Stores which have not been in use.

In the case of **wooden or composite ships:**

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions:

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labor metaling are subject to a deduction of one-third.

In the case of **ships generally:**

In the case of all ships, the expense of straightening bent ironwork, including labor of taking out and replacing it, shall be allowed in full.

Graving dock dues, including expenses of removals, cartages, use of shears, stages, and graving dock materials, shall be allowed in full.

Rule XIV.—Temporary Repairs.

No deductions "new for old" shall be made from the cost of temporary repairs of damage allowable as general average.

Rule XV.—Loss of Freight.

Loss of freight arising from damage to or the loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Rule XVI.—Amount to be Made Good for Cargo Lost or Damaged by Sacrifice.

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.

Rule XVII.—Contributory Values.

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed; deduction being made from ship-owner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

Rule XVIII.—Adjustment.

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these Rules.

THE HARTER ACT.

FEBRUARY 13, 1893.

AN ACT RELATING TO NAVIGATION OF VESSELS, BILLS OF LADING, AND TO CERTAIN OBLIGATIONS, DUTIES, AND RIGHTS IN CONNECTION WITH THE CARRIAGE OF PROPERTY.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers,

agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in anywise be lessened, weakened or avoided.

SEC. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

SEC. 4. That it shall be the duty of the owner or owners, master or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.

SEC. 5. That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

SEC. 7. Sections one and four of this act shall not apply to the transportation of live animals.

SEC. 8. That this act shall take effect from and after the first day of July, eighteen hundred and ninety-three.

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